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Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1999

CHERI TROY,
Petitioner,

v.

PIERCE COUNTY,
Respondent

On Petition For Writ of Certiorari to the
Court of Appeals, Division II, of the State of Washington

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case the government desires to permanently preserve areas of land in a natural, undisturbed state, and a County ordinance accomplishes this by requiring owners of the selected land, as a building permit condition, to "protect" the selected area by deeding a tract, easement, or land dedication to "the County" or "the public", and, by having county signs installed every 30 feet to mark the boundaries of the preserved tract.

1) Where the owner's proposed construction does not create the need for a land preserve, is just compensation required under the U.S. Constitution's Fifth Amendment (applied to the States through the Fourteenth Amendement) for the property conveyance and/or for the physical occupation of the signs?

2) In acquiring the above tract, where the County provides no hearing, nor any process for getting compensation, and requires the conveyance to be made by recording a plat of subdivision that violates plat statutes (a gross misdemeanor), is there just cause for damages for denial of due process under the U.S. Constitution's Fifth Amendment and/or for deprivation of civil rights under 42 U.S.C. § 1983?

3) Since the above ordinance is applied at development time, when it is common to have the land as subject or collateral in financing contracts, is the County's appropriation of a property interest without any consideration of existing contract interests or obligations, in violation of Article 1 § 10 [1] of the U.S. Constitution: "No State shall * * * pass any * * * Law impairing the Obligations of Contracts * * *" ?

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties to the proceeding in the Court of Appeals of the State of Washington.

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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1999

CHERI TROY, *Petitioner,*
v.
PIERCE COUNTY, *Respondent*

On Petition for a Writ of Certiorari to the
Court of Appeals, Division II, of the State of Washington

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Cheri Troy, respectfully prays that a writ of certiorari issue to review the judgement of the Court of Appeals, Division II, of the State of Washington, in this case.

OPINIONS BELOW

The decision of the Court of Appeals, Division II, of the State of Washington, issued Oct. 1, 1999, appears in Appendix (App.) A. It is unpublished, but circulates as 1999 WL 780997 (Wash.App. Div. 2).

Denial of the Motion to Reconsider the Court of Appeals decision was issued Nov. 3, 1999, and appears in App. D 1.

Denial of the Petititon for Review by the Supreme

Court of Washington was issued May 3, 2000, and appears in App. D 2.

The Judgement and Order Dismissing Petitioner's Action from the Superior Court of the State of Washington, filed May 5, 1998, appears in App. B. It was unpublished.

The Report and Decision on the Variance, issued December 23, 1997, appears in App C. It was unpublished.

JURISDICTION

Petitioner seeks review from the judgement of The Court of Appeals of the State of Washington entered on Oct. 1, 1999. Timely Motion for Rehearing was denied on Nov. 3, 1999. Timely Petition for Review by the Supreme Court of Washington was denied May 3, 2000, at which point the Court of Appeals decision became final in the Washington State Court system. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment of the United States Constitution provides:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

It is applied to the States by the Fourteenth Amendment to the United States Constitution:

> " No State shall make or enforce any law which shall abridge the priveleges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of

law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 1 § 10[1] of the United States Constitution provides:

"No State shall * * * pass any * * * Law impairing the Obligation of Contracts * * *."

The regulations challenged as unconstitutional are sections of the Wetland Management Regulations (WMR), Pierce County Code (PCC) 17.12, duly enacted in 1992. The provisions of the ordinance were rearranged and renumbered in 1997, but are still in force.

PCC 17.12.140(E)(1) provides:

"Prior to final approval of any wetland application, the part of the wetland and/or buffer which is on the site shall be placed in a separate wetland tract or tracts, protective easement, public or private land trust dedication, or similarly preserved through an appropriate permanent protective mechanism as determined by Pierce County. All wetland tracts, protective easements, land trust dedications shall remain undeveloped in perpetuity, except as they may be allowed to be altered pursuant to this Chapter." (Now PCC 18E.30.070(A))

PCC 17.12.120(C) provides:

"Following approval of the delineation report or the Department's completion of the delineation, the applicant shall place permanent clearly visible markers on-site at the edge of the buffer." (Now PCC 18E.30.100(C))

PCC 17.12.140(E)(2) provides:

"Prior to final approval of any wetland application, the common boundary between a wetland tract, protective easement, land trust dedication, or other similarly preserved area and the adjacent land shall be perma-

nently identified with permanent signs. Sign locations, wording, and size and design specifications shall be as required by the Department." (Now PCC 18E.30.070(B))

STATEMENT OF THE CASE

History.

In Pierce County (the County), it doesn't take much to be a wetland; it doesn't even take water. By definition, the presence of a body of water is not required, nor is any standing water required, ever. A wetland is an area whose soil gets saturated often enough to support weeds that tolerate moisture. (PCC 17.12.020(AK) in App.E 2)

In 1991, petitoner Troy, doing business as "Betty Brown," purchased, on contract, five acreas of hilltop farmland. A knee-deep depression in the north-center of the land was home to a winter puddle, with a surface area approximately the size of a large swimming pool.

In 1992, Pierce County passed its Wetland Management Regulations (WMR), whose purposes include maintenance and enhancement of both ecological functions and recreational values. (PCC 17.12.010 in App. E 2) The ordinance calls for the identification and delineation of wetlands, assignment of buffer widths, and the moving of all development outside buffers, when possible.

It then requires the wetland and buffer to be "protected" by conveyance into a tract, easement or dedication, to "remain undeveloped forever," and the boundaries of the preserve are to be marked with permanent signs.

In 1993, Troy applied for a permit to build a farmhouse. She was told the southeast corner of her parcel had a

wetland, so a wetland application was necessary for the house, her farming being exempt:

> "17.12.050 Exemptions.
> The following activities are exempt from the provisions of this chapter:
> A. Existing agricultural activities. The activities cease to be existing when the area on which they were conducted has been converted to a non-agricultural use or has lain idle * * * more than five years * * *"
> (Now PCC 18A.20.030(A))

The southeast corner of the parcel had no wetland, but the county pounced upon the center of the parcel, declaring approximately an acre to be wetland, and eventually measuring out two more acres to be buffer. The County stated that if Troy relocated her house outside of wetland and buffer, there would be no impact, no mitigation needed, and wetland approval would be issued. (Administrative Record (Admin.Rec.) at 22, 39)

This process culminated in the County's letter of August 22, 1994 (Admin.Rec. 46-51, *infra* App F-G). If she confined her house to the northeast corner of the parcel, an approval would be issued, but first:

> Troy must have signs installed every thirty feet around the buffer boundary,
> A "Wetland and/or Buffer Notice" must be signed and notarized,
> The County must date and sign the "Conditions of Wetland Approval,"
> The above two documents, plus the County's "site plan," must be recorded on the title to the property. (App. G).

Troy, a former Illinois realtor, realized that the papers were a contract agreement whereby she would forfeit all rights to use the land, in favor of the County's land use of a "preserve." By recording the land as "wetland" and "buffer" she would lose her existing farm exemption. As a contract purchaser, not an owner, Troy could not infringe title, and damaging the farm-ability of the land would violate her land purchase contract.

No information was given on how to protest the requirement of the ordinance.

The WMR had an appeal procedure, but it could only be used for a "decision":

> PCC 17.12.150
> "Reconsideration and Appeal Procedures.
> Requests for Reconsideration and Appeals of a decision issued under this Chapter shall be considered by Pierce County according to procedures in Chapter 18.10 of the Pierce County Zoning Code."

Nothing had been sent that purported to be a "decision", nor was there any notice that a decision had been filed.

There was a reasonable use exception process (PCC 17.12.120) for siting a house (useless, since Troy already had a house site), and a reasonable use exception (PCC 17.12.080) for expanding allowed uses (useless, since Troy could already do everything she wanted with the farm exemption). The problem was the conveyance requirement, which would remove the land from farm usage, end the farm exemption, and violate her purchase contract.

On Oct. 13, 1994, Troy wrote a letter to the County (Admin.Rec. 52-55) about the conveyance requirement, asking for compensation, and pointing out that while state law (Revised Code of Washington (RCW) 36.34.340) authorized County aquisition of conservation interests by purchase, gift, devise, bequest, grant, or exchange, the State had not authorized aquisition by withholding of permits; that was classified as extortion. Troy asked for a "decision". The County did not answer.

To facilitate resolution of the problems, Troy applied for Conservation Futures funding for County purchase of the land, and asked Planning and Land Services (PALS) to sign one form; a statement that the county was willing to accept and hold the very rights they were seeking (Admin.Rec. 65-68). PALS refused, thus halting the funding process (Admin.Rec. 64).

Troy wrote a second letter (July 11, 1995, Admin. Rec. 69-73), again questioning the County's authority to acquire land by withholding permits, and questioning why, if the regulations were valid under police power, a conveyance was required at all. And why the County was trying to acquire a property interest without a deed. (At that time Troy didn't understand that in Washington, a "deed" is a document that is written, signed and notarized. The presence of the word "deed" is not required. The papers to be recorded WERE a deed. (RCW 64.04.020))

The County forwarded Troy's questions to the County Prosecuting Attorney's office, who sent Troy a letter which didn't directly address her concerns. (Admin. Rec. 77-79). It did explain the history of the regulations; that they were created to carry out the Governor's agenda for land preservation. It also stated that tax assessment relief was available

through WMR 17.1[2].195. This confirmed that the tract/ easement/dedication was being made, for the tax discount is based on the area of the preserved tract. (PCC 17.12.195(C) App. E 3)

This led to the discovery of the easement/dedication "deed". The "Notice" form (App. G 2) contains the statement:

> "Attachments 2:
> Wetland Approval
> Plat map or final binding site plan depicting the wetland and buffer areas * * * "

Troy had assumed that "final binding site plan" referred to the "site plan" she was to record. However, she discovered that a "binding site plan" is a method of subdivision which may only be used for condominiums, trailer parks, commercial and industrial parks (RCW 58.17.035). Therefore, she must be recording a "plat." A "plat" is:

> RCW 58.17.020(2) Plat "is a map or representation of a subdivision, showing thereon the division of a tract or parcel of land into lots, blocks, streets and alleys or other divisions and dedications."

Since a "plat" contains only divisions and dedications, the lines on the plat were legal land divisions, and the notations were dedications that served to deed the land to the public, the same way public parks are created. "Dedication" is:

> RCW 58.17.020(3) ""Dedication" is the deliberate appropriation of land by an owner for any general and

> public uses, reserving to himself no other rights than such as are compatible with the full exercise and enjoyment of the public uses to which the property has been devoted. The intention to dedicate shall be evidenced by the owner by the presentment for filing of a final plat or short plat showing the dedication thereon; and, the approval of such plat for filing by the appropriate governmental unit."

and:

> RCW 58.17.165 (last paragraph): "Any dedication, donation or grant as shown on the face of the plat shall be considered to all intents and purposes, as a quitclaim deed to the said donee or donees, grantee or grantees for his, her or their use for the purpose intended by the donors or grantors as aforesaid."
>
> [emphasis added]

Pierce County records these with the landowner as "grantor" and "Pierce County" or "the public" as "grantee". Troy had discovered the "deed".

She had also discovered the "Subdivision Problem". Troy would be committing a crime if she recorded the plat. In Washington, the subdivision process is long and arduous, with applications, reports, hearings, and NO EXCEPTIONS. (RCW 58.17.030 in App. E 1) For Troy to simply record that plat would be a gross misdemeanor under RCW 58.17.300 (App. E 1) and PCC 16.14.020. (In Washington, that is a crime on par with theft in the third degree, jury tampering, and assault in the fourth degree.)

Recording the plat would also violate both the WMR ordinance itself, and the very "Conditions" to be recorded with the plat. They both require compliance with all other

laws (PCC 17.12.040(A), .180 in App. E 2, Conditions in App.G 5)

On March 28, 1996, a letter from the County's Dan Drentlaw expressed his belief that the County's determination that a wetland existed on the property might be challenged by an administrative appeal. Despite the fact that the WMR does not authorize the appeal of wetland "determinations," Troy and her Counsel hired a wetland expert, who found that the soil did conform to Pierce County's definition of "wetland." Troy had no basis to pursue an appeal.

Procedural History.

Variance

On Aug. 18, 1997, Troy, represented by Counsel, filed an application for a variance. The issues of the uncompensated conveyance and the physical occupation of the signs were introduced in the variance application and the accompanying letter. The subdivision problem and the problem with impairment of the purchase contract were introduced at the hearing.

At the hearing, the County was unable to identify any wetland value present in Troy's land. (Variance Transcript 12) Nor was the County able to identify any impact, hazard or burden caused by Troy's house, which would justify the conveyance requirement.

Variance was denied on Dec. 23, 1997 (App. C). As to the conveyance, the examiner made Finding 10 that confirmed that 17.12.140(E)(1) was required (placement of wetlands and buffers in a separate wetland tract or similarly protected) and that recording the notice, wetland conditions,

and the site plan was "sufficient to protect the wetlands." (App. C 12).

Although the Hearing Examiner found there might be a constitutional interpretation to the filing of the "notice" (Finding 12 - App. C 13), he only contemplated findings of unconstitutionality on the "wetland conditions and the recording thereof" (Finding 12 - App. C 13), the "requirement of the 100 foot buffer width" [established by recording the map] (Finding 13 - App. C 14), and the "County's actions" (Conclusion 3 - App. C 16).

The issues of the physical signs, the illegal plat, and impairment of contract were ignored. The examiner failed to provide any alternative for the requirement that Troy record the illegal plat. The variance decision became the final administrative decision on Jan. 6, 1998, only appealable to State court through the Land Use Petition Act (LUPA) (App. C 18)

Superior Court

As directed, Troy timely appealed to the Pierce County Superior Court, State of Washington. All three constitutional challenges (conveyance and occupation without compensation, denial of due process, and impairment of contract, all both "facial" and "as applied") were introduced in the initial "Land Use Appeal Petition and Civil Complaint". Added were the issues of deprivation of civil rights under 42 U.S.C. § 1983, request for attorney fees under 42 U.S.C. § 1988, and a claim for damages under RCW 64.40.[1] (Remedies

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[1] RCW 64.40 is an action for damages for property owners who have filed for permits, to obtain relief from acts of an

requested were compensation or restoration of land use , declaratory relief, and damages.)

The case was dismissed prior to briefing and trial on May 1, 1998. (App. B)

All facial constitutional challenges were dismissed on the theory that "Petitioner must demonstrate that the County has denied her "all economically viable use of any parcel of regulated land" to bring a "facial" constitutional challenge and Petitioner has not done so." (App. B 2)

All "as applied" constitutional challenges were dismissed on the theory that there were administrative remedies available which Troy had not exhausted. (App. B 2-3)

The court did find that Troy was being required to "comply, and not vary from" applicable regulations, including the WMR. Yet the court failed to provide any alternative to the requirement that Troy record the illegal plat. (App. B 3)

Court of Appeals

Troy timely appealed to the Court of Appeals, District II, State of Washington. The appeal of the variance was dropped; only those issues connected to the conveyance, physical occupation of the land, and improper dismissal of the case were appealed. All three constitutional challenges (conveyance and occupation without compensation, denial of due process, and impairment of contract, all both "facial" and "as applied"), plus 42 U.S.C. § 1983, 42 U.S.C. § 1988, and

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agency which are arbitrary, capricious, unlawful, or exceed lawful authority. (App. E 1). In this case it is similar to and entwined with the due process and deprivation of civil rights claims.

RCW 64.40 were introduced in the opening brief. (Remedies requested remained compensation or restoration of land use, declaratory relief, and damages.) [2]

A hearing was held May 11, 1999. The opinion was filed Oct. 1, 1999 affirming the lower court decision.

Cause of action: The opinion starts by misstating Troy's cause of action: " * * * Regulations caused a reduction in the value of her property * * * ". (App. A 1)

Facial challenges: The court first disposed of all the facial constitutional claims: "To succeed in a facial challenge, a plaintiff must show a total taking of the property's value. * * * Troy concedes that her property retains some economic value." (App A 12 footnote 11).

Physical occupation: The court found the physical occupation by the signs couldn't be challenged, because Troy hadn't actually posted them. (App. A 12 footnote 11)

Conveyance: The conveyance and nexus/proportionality test were swept away with:

> "But the WMR merely require a separate wetland tract, protective easement, or public or private land trust dedication. PCC 17.12.140(E)(1). Troy has never contended that the WMR require her to allow the public to use her wetland. See *City of*

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[2] In Dec. of 1998, Troy, no longer able to bear the financial burden of making payments for farmland which the County prevented her from using, sold the property, with full notice to the purchaser of the preservation servitude that the County had imposed. Her motion to the Court of Appeals to eliminate "restoration of land use" from her requested remedies was granted, leaving only financial and declaratory remedies.

Monterey v. Del Monte Dunes at Monterey, Ltd., __ U.S. __, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999) (Dolan rough-proportionality test extends only to land use decisions conditioning development on dedication of property to public use." (App. A 11, footnote 10)

Having eliminated the "per-se" takings (taking of title and physical occupation), the court engaged in a regulatory takings analysis, finding that the remaining value of the property must be known to determine if there's been a taking.

Due process, 42 U.S.C. § 1983, and RCW 64.40: The 64.40 claim was set squarely before the court in issue 5 of Troy's opening brief: "There are two acts of the County which qualify for this action: the illegal subdivision of Ms. Troy's parcel and the improper withholding of permits" (brief, pg 32 *et. seq.*) These, as well as the associated due process and 42 U.S.C. § 1983 claims were ignored. The court bypassed them by dredging up some sentences from "Clerk's Papers at 11," substituting them for Troy's real issues, and dismissing the claims. (App. A 14)

Impairment of Contract: After several repetitions, throughout the decision, of the lower court's finding; that Troy is required to comply with, not vary from applicable regulations, the court addressed the Impairment of Contract challenge with a 180° about face, finding that the "County never enforced this provision against Troy. It is not included as a precondition to her final wetland approval." No support was provided for this finding. (App. A 17)

Motion to Reconsider the Court of Appeals decision was denied Nov. 3, 1999, and a Petititon for Review was denied by the SupremeCourt of Washington May 3, 2000. (App. D 1-2)

REASONS FOR GRANTING THE PETITION

Supreme Court Rule 10 lists, among the considerations governing review on certiorari:

> "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;" rule 10(b)
>
> "a state court * * * has decided an important federal question in a way that conflicts with relevant decisions of this Court." rule 10(c)

All of these circumstances are present in this case.

1) THE DECISION OF THE COURT OF APPEALS DEPARTS FROM ESTABLISHED TAKINGS JURISPRUDENCE

"Taking of title," and physical occupation of land have universally and invariably been adjudged a "taking," as both appropriate property:

> "Where the government authorizes a physical occupation of property (or actually takes title), the Takings Clause generally requires compensation." *Yee v. Escondido,* 503 U.S. 519, 522 (1992)

Prior to *Pennsylvania Coal Co. V. Mahon*, 260 U.S. 393 (1922), the taking clause was applied virtually exclusively to cases of actual seizure of title or of continuing physical occupation of property. (Bosselman, Callies & Banta, "The Taking Issue", U.S. Govt. Printing Office, 1973).

In *Mahon*, this Court adopted the view that a regulation which goes too far in restricting property rights might also be viewed as a taking. *Mahon* added a new concept to the old concept of taking, so that a regulation which did <u>not</u> involve a per-se appropriation might still be damaging enough to qualify as a taking. "Regulatory takings" cases create a

right to compensation in addition to that already existing for outright appropriation of private property.

In this case, the Court of Appeals, seeing an appropriation of title and a demand for physical occupation written within a regulation, reversed the established order of takings review. Per-se appropriations were subordinated to the regulatory takings test.

Under this tenet, the "facial" constitutional test was not made by comparing the demands of a law on its face with the requirements of the constitution. Instead, everything is automatically constitutional as long as the remaining value of the land is more than zero.

2) In taking this approach, THE COURT OF APPEALS IS IN CONFLICT WITH KEY DECISIONS OF THIS COURT, AND OTHER STATE AND FEDERAL COURTS.

Physical occupation: In *Loreetto v. Teleprompter Manhatten CATV Corp.*, 458 U.S. 419, 426-27 (1982), this Court made it clear that:

> "when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred."
> "When faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking."

(See also *St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92, (1893), *rehearing denied* 149 U.S. 465 (1893) - physical occupation by posts, and *Hendler v. U.S.*, 952 F.2d 1364, 1374 (Fed.Cir. 1991) - "The government does not have the right to declare itself a co-tenant-in-possession with a property owner.")

The Court of Appeals squarely ignored that directive.

Prerequisites: Instead, the Court of Appeals proposed the theory that Troy must submit to the challenged conditions by installing the posts and recording the conveyance ("completing the administrative process"), as a prerequisite to contesting their constitutionality. (App A 12 - top and footnote 11) This conflicts with the holding of *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985); the only prerequisites for a constitutional challenge to a condition are that the landowner seek and obtain a final decision on a waiver or variance from the condition, and seek and be denied compensation.

There is also conflict with *Nelson v. City of Lake Oswego*, 869 P.2d 350 (Or.App. 1994), in which that court, faced with a similar question, discriminates between "regulation" and "property acquisition," and their prerequisites for a constitutional challenge, and *Lacy v. United States*, 216 F.2d 223, 225 (fifth cir. 1954), which states quite simply that the government may not enjoin a property owner from the use of his own lands, without offering to compensate him.

Nexus test: The Court of Appeals opinion also brings a new interpretation to *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan v.City of Tigard*, 512 U.S. 374 (1994). Those cases established the "nexus/proportionality" test; when the government requires a conveyance of property from a landowner, as a building permit condition, the government must show that the need for the "exaction" is caused by the landowner's proposed building.

The Court of Appeals interpreted the *Nollan/Dolan* test to mean the nexus/proportionality test is only to be applied in cases where there is both an exaction and actual use by members of the public. [And presumably if the test is not applied, and the government does not a show a "nexus," then the government doesn't have to provide compensation.] (App. A 11 footnote 10) .

This narrow view is not shared by *Nelson, supra*, where the "exaction" to be tested was a drainage ditch., nor with *J. E. D. Associates, Inc. v. Atkinson*, 432 A.2d 12, (New Hampshire, 1981), where the "exaction" was the requirement of removing a stone ledge.

Public use: The Court of Appeals' interpretation of "public use" in *Dolan* as only "use by members of the public" conflicts with many cases that have ruled "public use" encompasses anything the legislature deems to be remotely beneficial to the public. *United States ex rel. Tennessee Valley Authority v. Welch*, 327 U.S. 546 (1945). It also conflicts with *Montana Power Company v. Bokma*, 457 P.2d 769 (1969) - utility lines are a public use, *Long Island Water Supply Co. v. Brooklyn*, 166 U.S. 685, 689 (1897) - water supply is a public use. *Nollan* itself, at 837, discusses the exaction of "an easement to serve some valid governmental purpose," without any requirement of occupation by people.

Contracts: The County's failure to consider the land contract as "property," which is also subject to the rule of just compensation, conflicts with the decision of *Long Island, supra*, at 690, that contracts are "within the protecting reach of the prohibitory clause of the constitution." See also *Offield v. New York, N. H. & H. R. R. CO.*, 203 U.S. 372 (1906) where impairing the obligation of a lease between corporations was found to impair the contract rights of a stockholder.

3) THIS IS NOT AN ISOLATED CASE: THE COURT OF APPEALS IS FOLLOWING PRECEDENTS SET BY THE WASHINGTON STATE SUPREME COURT.

Allingham: In *Allingham v. Seattle*, 749 P.2d 160, (1988) property owners challenged a municipal zoning ordinance requiring 50 to 70% of their lots to be "reserved" as a greenbelt preserve. The areas were to be retained in or

restored to a natural state.

The State Supreme Court analysed the case as a regulatory takings, and found in favor of the land owners, that the "ordinance deprives certain landowners of all profitable use of a substantial portion of their land", and, "Although he still holds title to the property reserved as greenbelt land, he is denied the control over his property typically accorded landowners. We deem this to be a taking." (749 P.2d at 163)

The problem with this decision is that the landowners were required to record the boundaries and legally establish the preserve on title. (SMC 23.70.50(A), .60(A)). It wasn't just "regulation," it was the taking of an easement or dedication. The court's analysis ignored the appropriation of title.

To make things worse, Allingham was overruled for use as precedent in *Presybytery of Seattle v.King County*, 787 P.2d 907 (1990). *cert. denied*, 498 U.S. 911, (1990) on the basis that one should not consider a portion of undivided property to determine whether there might be a taking, and one shouldn't equate a physical taking with a regulation upon the land's use. (747 P.2d at 914, 915) Neither of these circumstances applied to *Allingham.*

Presbytery: In *Presbytery, supra,* the landowner had a parcel of land with wetland. King County's ordinance designated wetlands (one third of Presbytery's parcel was wetland), added to that a buffer zone, and then required a native growth protection easement. (787 P.2d at 910) The fact that the easement was an appropriation of a property interest, a taking of title, was never part of the Court's deliberation. The entire opinion was a regulatory takings analysis.

Presbytery's claim was dismissed as not ripe, because he hadn't applied for a building permit.

Then came Troy. She has a regulation which demands a dedication, plus a physical occupation, and she'd applied for a permit (the house had no impact), and she'd done the vari-

ance, done an appeal. It should have been an unconstitutional slam dunk. But it wasn't. The State Supreme Court denied certiorari.

It was a landmark non-decision. By denying review, the State Supreme Court gave a silent nod of approval for Washington's governmental takings without compensation to continue. To grow. There is nothing to stop them.

4) TROY IS NOT JUST ONE.
SHE IS ONE OF THOUSANDS.

To date, (June, 2000) one thousand four wetland "approvals" have been recorded by the Pierce County Auditor's office, each a "grant" from a landowner to "Pierce County" or "the Public." A sampling of the file shows these to be substantially the same as Troy's paperwork; a notice, deed restrictions, a plat.

Under the WMR, 6,580 people will be required to record these "grants" in Pierce County.

The Hearing Examiner's finding 14 A states: "The fact that the applicant's property contains a wetland is not a special circumstance." (App. C 14) Indeed, of the approximately 7,064 quarter-sections covered by Pierce County, 3,790 have one or more wetlands.[3] Over half of them.

Troy's wetland affects five other parcels. If we assume, conservatively, that only two parcels are affected in each wetland quarter-section, that would be 6,580 people subject to the WMR. That's 5576 more people that are slated for forfeiture of both their property and their constitutional rights by Pierce County. But it doesn't end there.

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[3] A "quarter-section" is one fourth of a square mile of land. Numbers were provided by Pierce County's Geographical Information Services Dept.

It goes beyond Pierce County; other jurisdictions have similar ordinances.

Although millions of dollars in taxes have been earmarked to fund the purchase of conservation areas ($2,356,000 in Pierce County's budget for 2000), the counties would rather get land for free. Other jurisdictions, following this land aquisition method, are adopting similar regulations, similar patterns of behavior, with no provision for compensation:

Clark County,	CCC 13.36.250:	permanent markers, conservation covenant
Island County,	ICC 17.02.110(5):	buffers and conservation easement
Thurston County,	T.C. 17.15.340:	may require easement
	.345:	may require signs
King County,	KCC 21A.24.160:	signs
	.180:	tract on subdivisions
City Bonney Lake,	BLC 16.20.150:	signs
	.220:	deed restrictions
City of Edgewood,	EMC Title 18E:	adopts by reference all Pierce County's regulations

5) WITHOUT THIS COURT'S PROTECTION, PROPERTY RIGHTS WILL BE EXTINCT IN WASHINGTON STATE, AND BEYOND.

Cities and counties are getting better at obscuring conveyances with words: "the administrative process," "the wetland approval," "only a notice on title," "only what the ordinance requires". The courts here have turned takings jurisiprudence upside down and no longer protect our property rights.

Every landowner in the country is affected by this attack on property rights.

Review by this court is our last hope.

CONCLUSION

Since our judges and justices are as diligent and conscientious as those of any other state, there must be similar confusion throughout all the States. This Court's supervision is desperately needed.

This Petition for Writ of Certiorari should be granted.

You may also wish to consider summary reversal pursuant to 28 U.S.C. § 2106.

Dated: July 27, 1999

Respectfully submitted,

Cheri Troy
Petitioner, Pro Se
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APPENDIX

A 1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CHERI TROY, Appellant v. PIERCE COUNTY, Respondent.	No. 23374 6-II UNPUBLISHED OPINION Filed: OCT 01 1999

HOUGHTON, J. -- Cheri Troy sought damages in inverse condemnation and other state and federal statutes, alleging that the Pierce County Wetland Management Regulations caused a reduction in the value of her property and the County's actions in processing her wetland application violated her due process rights. She appeals from a trial court order dismissing her claims. We affirm.

FACTS

In 1991, Cheri Troy[1] purchased five acres of undeveloped real property in Pierce County on a real estate contract. Troy intended to construct a single-family dwelling on the property.[2] In 1992, Pierce County (County) enacted Wetland Managment Regulations (WMR) to implement the policies of the State Environmental Policy Act[3] and the

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[1] The application materials also listed the owner of the property as Betty Brown, with Cheri Troy and Jeff London as the applicants. Apparently, Jeff London no longer has my interest in the property development. Troy uses the name "Betty Brown" for business purposes.

Growth Management Act.[4] See also Pierce County Ordinance 91-128S3 (codified at Pierce County Code (PCC) 17.12.010-.210).

A 1993 wetland inventory map showed a wetland on the southeast portion of Troy's property. She was therefore required to submit a wetland application to the County before she could obtain a building permit. On February 26, 1993, Troy submitted the application. As part of the application process, the wetland had to be categorized, which Troy requested the County do.

In the process of categorizing the wetland, the County's Department of Planning and Land Services (PALS) identified a large wetland running through the center of Troy's property, bisecting the eastern and western portions. PALS identified the wetland as a category II wetland, subject to the WMR. A category II wetland requires a 100-foot buffer. PCC 17.12.070. In Troy's original site plan, her house and well encroached upon the wetland buffer. The County informed her that if she moved all of her proposed uses outside the regulated wetland areas, no mitigation would be required. The County also suggested mitigation steps that might be suitable for her site if she did not move her proposed uses.

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[2] Troy claims she intended to farm the land to pay the contract and generate a profit. But on her wetland application, in response to a request that she describe her proposed uses, including agricultural and livestock uses, she stated: "No livestock. Single family dwelling to be built." Administrative Record at 4. Later, in her variance application, Troy submitted a land use plan showing a chicken coop, animal barn, water bird shelter, fruit trees, and garden.

[3] RCW 43.2 1 C.

[4] RCW 36.70A.060.

On August 24, Troy submitted scale drawings of the wetland delineations and a revised site plan. Troy was again notified that her proposed development was within the wetland buffer area. The County noted there was sufficient room on the property to move her proposed developments out of the buffer area and again recommended she do so; additionally, the County again noted the WMR do allow for construction of a single-family dwelling in a buffer area if mitigation is undertaken.

On July 21, 1994, Troy submitted another site plan. On August 22, the County notified Troy that "[y]our current proposal is located outside the wetland and its buffer, and we are issuing your Wetland Approval." Administrative Record at 46. The notification outlined several steps Troy needed to take in order to complete the approval process: (1) mark the edge of the wetland buffer with permanent markers placed every 30 feet, as required by PCC 17.12.120(C); (2) fill out a Wetland and/or Buffer Notice[5] and have it notarized; (3) bring the Wetland Approval to PALS and have it signed and dated by an environmental biologist; and (4) have the Notice, the Conditions of Wetland Approval[6] and a copy of the site plan recorded on the title to the land. Steps 1, 2, and 4 are required by the WMR before final approval of a wetland application. PCC 17.12.040; .140(D); .140(E)(2).

The County additionally noted that staff had revisited

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[5] The substance of the Notice states:

> This property contains wetlands or wetland buffers as defined by Pierce County Code 17.12. Restrictions on use or alteration of the wetlands or wetland buffers may exist due to natural conditions of the property and resulting regulations.

Administrative Record at 50.

[6] The Conditions of Approval reiterate the activities regulated by the WMR. See PCC 17.12.040.

the site with Troy on August 17, identified a buildable area on the eastern portion of her parcel, and had seen that access to the western portion of the parcel was blocked by wetland. The County stated that Troy's simplest option was to confine her building to the identified area, assuming the Health Department would determine that the soil was suitable for a drainfield. If it was not, the County suggested exploring the possibility of obtaining a drainfield easement on a neighboring parcel, or placing the drainfield within the wetland and providing mitigation to repair any wetland damage.

Alternatively, Troy could place her home on the northwest corner of her parcel and try to obtain an access easement from neighbors, or through the wetland by going through the reasonable use exception process, which includes mitigating damage to the wetland caused by the easement. Finally, the County noted that the approval was "only good for three years from now, not from when you record the information." Administrative Record at 47.

At this point, the relationship between the parties became strained. On October 12, Troy wrote a letter to PALS asserting that the County was taking her property and requesting that the County purchase the property "at fair market value." Administrative Record at 55. Troy seemed particularly concerned about a provision of the PCC that appeared to her to transfer property rights from her to the County:

> Prior to final approval of any wetland application, the part of the wetland and/or buffer which is on the site shall be placed in a separate wetland tract or tracts, protective easement, public or private land trust dedication, or similarly preserved through an appropriate protective mechanism as determined by Pierce County. All wetland tracts, protective easements, land trust dedications and other similarly preserved areas shall remain undeveloped in perpetuity, except as they may be allowed to be altered pursuant to this Chapter.

PCC 17.12.140(E).

On December 21, the County notified Troy that it still had not received information from Troy's septic designer and was waiting for the information before any further action on her proposal. It also indicated that a driveway crossing the wetland to a house on the western portion of the parcel was "extremely unlikely to be approved." Administrative Record at 58. On December 13, Troy's engineer determined that the eastern portion of the site was unacceptable as a drainfield location, but that the northwest corner did have acceptable soil for a drainfield.

In June, Troy investigated the County's "Conservation Futures" program, by which "threatened areas" of land may be purchased by or given to the County. Administrative Record at 66. On June 23, Troy faxed the County an affidavit to complete and sign stating that it was "willing to accept and hold any property rights" acquired from Troy's property. Administrative Record at 68. On June 30, the County responded by referring Troy to the Parks and Recreation Department and informing her that "there are far more requests for purchase than there is money available." Administrative Record at 64.

On July 11, Troy sent the County a letter stating that it was being sent as "a final 'administrative remedy' before proceeding with other legal action." Administrative Record at 69. The letter stated Troy's belief that the County was violating a number of state statutes by requiring her to go through the wetland approval process in order to obtain a building permit. It requested the County "immediately cease [its] unlawful actions" and demanded a response within 10 days. Administrative Record at 73.

On July 14, Troy responded to the County's June 30 letter about the Conservation Futures program by informing the County that she was "already in process" with the program and considered it an "administrative remedy." Administrative Record at 74,

On July 19, the County informed Troy that the issues she had raised in her July I I and 14 letters could not be

adequately addressed by PALS staff, and so the letters were being forwarded to the Civil Division of the Prosecuting Attorney's office.

On July 26, the Prosecuting Attorney's office sent Troy a letter briefly explaining the history of wetland protection regulations and saying PALS apparently had "acted within its legal authority and [had] not attempted to take any part of [Troy's] property." Administrative Record at 78.

On March 28, the County wrote to Troy, indicating it understood that Troy had spoken to someone at the County and wanted to contest the determination that wetland existed on her property. It stated Troy could do this either by submitting a verification report by a certified biologist stating that no wetland exists on her property, or by filing an appeal of administrative decision under PCC 18A.85.050. A handwritten note on the bottom of the letter states, "Questioning the presence of a wetland is not properly addressed through the variance procedure. A legal opinion may be received from Jill Guernsey, Deputy Prosecuting Attorney." Administrative Record at 88. Troy did not take either of the steps necessary to challenge the determination that wetlands exist on the property.

On August 18, 1997, Troy, represented by counsel, filed an application for a wetland variance. A hearing was held on November 13.

At the hearing, Troy's attorney first noted that Troy was not challenging the "county's delineation of the wetland as a Category 2." Report of Proceedings (Nov. 13, 1997) at 14. Rather, she was "challenging certain aspects of the Wetland Ordinance itself." Report of Proceedings (Nov. 13, 1997) at 14. The hearing examiner (Examiner) noted he did not have the authority to declare the ordinance either unconstitutional or invalid. Troy argued that the Examiner had authority to vary it where applying it would violate the state and federal constitutions.

The Examiner inquired as to Troy's exact request, and counsel responded the variance was requested so that Troy

would not be required to deed "specific identified property rights to the county," Report of Proceedings at 15, to allow Troy to put in an access road to the northwest portion of the property, and to reduce certain buffer areas so Troy could put in crops. The following exchange then occurred:

> Examiner: Excuse me. Let me ask you one other question. As I understand what you are saying then is that, even though the county has procedures for a reasonable use exception which would allow, if one is granted, would allow a road to be constructed through the wetlands and even though the county has a procedure for reducing the buffer, or buffer averaging, or whatever, around the Category 2 Wetland, that you feel that, in order to obtain the reasonable use exception and the buffer reduction, that you would have to go to expensive studies and that the county has indicated to you that even if you do this, it is not likely that these two things would be granted. And therefore, you are requesting the variance from the Wetland Regulations as an alternative to going through these things, which are not likely to succeed.
> [Counsel]: Well, and the county informs us up front -
> Examiner: Right, but is that pretty much what you are -
> [Counsel]: Basically, yes.

Report of Proceedings (Nov. 13, 1997) at 17-18. The Examiner denied the variance request.

In January 1998, Troy filed an action in Pierce County Superior Court alleging the following claims: (1) pursuant to RCW 36.70C, the Land Use Petition Act (LUPA), Troy appealed the denial of a variance[7] and the conditions imposed on the Wetland Approval; (2) inverse condemnation; (3) the County's actions constituted arbitrary

and capricious conduct, entitling her to damages under RCW 64.40.010-.020; (4) civil rights violation tinder 42 U.S.C. § 1983; and (5) impairment of contract. She requested declaratory relief, damages, and attorney fees and costs.[8]

The County moved to dismiss on the grounds that Troy had failed to exhaust her administrative remedies and that her claims were not ripe. The trial court granted the motion, concluding that Troy had failed to exhaust her administrative remedies, that even if she had not been afforded notice and an opportunity to appeal, the issues would not be ripe for review, and that administrative remedies were not

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[7] Troy also asserted that the WMR should not have been applied to her proposed development because her final plan showed construction of a dwelling outside of the prescribed wetland areas and buffers. But the WMR apply whenever a wetland is identified "on the site or may be within 150 feet of the site[.]" PCC 17.12.140(B). A "site" is "a parcel or combination of parcels of land on which a regulated activity is proposed." PCC 17.12.020(AD). Thus, the WMR were properly applied to Troy's property.

[8] Troy originally sought: an order allowing her to build an access way through the wetland; a declaration that the County had admitted that further application for an access way would be futile; a declaration that the County's August 22 letter constituted a demand that Troy convey property rights without compensation; and, a declaration that WMR 17.12.140 is unconstitutional in that it requires applicants to stake, sign, and record divisions of property, record specific use or development limitations without compensation, separate land into three tracts, with different incidents of ownership of the different tracts, and record this division in violation of local and state subdivision laws and ordinances.

futile. It also found the County had not placed requirements or limitations on Troy's use of the property greater than those allowed by the regulations and therefore had not violated Troy's rights under RCW 64.40. The trial court concluded that the County had only required that Troy comply with, and not vary from, applicable regulations. Troy appealed.

At oral argument, Troy revealed she had sold the property at issue in November 1998. She claims that her selling price reflected a reduction in the value of the land caused by the County's regulations. She amended her prayer for relief and now seeks only damages.

ANALYSIS

A. Standard of Review

The trial court dismissed Troy's claims based upon exhaustion principles. But we will not reverse the trial court if any theory can sustain its decision. See *State v. Norlin*, 134 Wn.2d 570, 582, 951 P.2d 1131 (1998) (citing *Sprague v. Sumitomo Forestry Co., Ltd.*, 104 Wn.2d 751, 758, 709 P.2d 1200 (1985)). We must consider not only whether the trial court properly dismissed Troy's claims, but also whether her later sale of the property renders her claims moot.

Whether a case is ripe for adjudication is a question of law. *Ventures Northwest Ltd. Partnership v. State*, 81 Wn. App. 353, 368, 914 P.2d 1180 (1996) (citing *Estate of Friedman v. Pierce County*, 112 Wn.2d 68, 75-76, 768 P.2d 462 (1989)). The appellate court reviews questions of law de novo. *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wn.2d 810, 813, 854 P.2d 1072 (1993).

B. Troy's Claims

1. LUPA

Troy appealed the Examiner's decision and the Wet-

land Approval conditions under the Land Use Petition Act (LUPA), RCW 36.70C. To have standing to bring petition under LUPA, a party must exhaust available administrative remedies. RCW 36.70C.060(2)(d); *Ward v. Board of County Commr's*, 86 Wn. App. 266, 270-71, 936 P.2d 42 (1997). The appeal must be from a final governmental decision. RCW 36.70C.020(l); *Estate of Friedman v. Pierce County*, 112 Wn.2d 68, 79, 768 P.2d 462 (1989). The court may affirm, reverse, or remand the land decision under review. RCW 36.70C.140.

Troy has sold her property and can no longer benefit from a variance or wetland approval. Her LUPA claim is therefore moot. See *Sorenson v. City of Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972) (court dismisses appeal where substantial question involved no longer exists).

2. Inverse Condemnation

Troy brings her inverse condemnation claim under the Fifth and Fourteenth Amendments of the U.S. Constitution, alleging both a taking and due process violation.[9] She

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[9] "[N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV, § 1. "[N}or shall private property be taken for public use without just compensation." U.S. Const. amend. V.

Under Washington law, when a land use regulation is challenged as both an unconstitutional taking and a due process violation, the court first analyzes the takings issue and then proceeds to the due process question. *Guimont v. Clarke*, 121 Wn.2d 586, 594, 854 P.2d 1 (1993), cert. denied, 510 U.S. 1176 (1994). But see *Macri v. King County*, 126 F.3d 1125, 1128 (9th Cir. 1997) (takings claim must be analyzed solely under Fifth Amendment because where explicit textual provi-

originally challenged the WMR both facially and as applied to her property.[10] At oral argument, Troy conceded that her facial challenge to the WMR was moot.[11] She now seeks damages for the alleged reduction in value of her property caused by the WMR. Her due process claim is, therefore, moot because invalidation of the ordinance, not money damages, is the remedy for a regulation that violates due process. *Presbytery of Seattle v.King County*, 114 Wn.2d 320, 331-32, 787 P.2d 907, *cert. denied*, 498 U.S. 911

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sions of the Constitution protects against the challenged government action, claim must be analyzed under the specific provision alone and not under more general substantive due process guarantee) (citing *Armendariz v. Penman*, 75 F.3d 1311, 1325-26 (9th Cir. 1996) (relying upon *Graham v. Connor*, 490 U.S, 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)), *cert. denied*, 118 S. Ct. 1178 (1998).

[10]At oral argument, Troy asserted that the County's dedication requirements amount to an unconstitutional exaction under *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L.Ed. 2d 304 (1994). But the WMR merely require a separate wetland tract, protective easement, or public or private land trust dedication. PCC 17.12.140(E)(1). Troy has never contended that the WMR require her to allow the public to use her wetland. See *City of Monterey v. Del Monte Dunes at Monterey*, Ltd., __ U.S. __, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999) (Dolan rough-proportionality test extends only to land use decisions conditioning development on dedication of property to public use); see also *Benchmark Land Co. v. City of battle Ground*, 94 Wn. App, 537, 548, 972 P.2d 944 (1999) (*Nollan/Dolan* test also applies when City conditions permit on cash payment from developer).

(1990). Insofar as Troy may be entitled to damages, her appeal is not moot as to this issue. [12]

The trial court dismissed Troy's takings claim, finding that she had failed to exhaust her administrative remedies because she refused to complete the administrative process and get a final decision from the County. Although Troy correctly asserts that exhaustion is not a prerequisite to a

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[11] To succeed in a facial challenge, a plaintiff must show a total taking of the property's value. *Guimont*, 121 Wn.2d at 595-96. Troy concedes that her property retains some economic value. And although a regulation that results in a physical invasion of the owner's property is a per se taking, *Guimont*, 121 Wn.2d at 597 (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798, 812 (1992)), Troy now lacks standing to contest the requirement that she post signs on her property. The signs were never, in fact, posted.

[12] Where injury is done to real property, right of action is in the then owner alone, and not in any subsequent purchaser. 59 Am. Jur. 2d *Parties* § 32 (1987). In the case of regulatory takings, only the person who owned the property when the challenged regulations were im posed can claim damages for a reduction in the value of the property. See, e.g., *Goldberg v. City of Rehoboth Beach*, 565 A.2d 936, 943-44 (Del. Super. Ct.), *aff'd*, 567 A.2d 421 (1989); *Boling Concrete Constr. Co. v. Townsend*, 686 S.W.2d 842, 843-44 (Mo. Ct. App. 1985) (inverse condemnation plaintiff who later sold land retained standing because damages were suffered at that time and did not pass to grantee who had obtained a reduced purchase price). Here, only Troy, not the later owner who allegedly bought at a reduced price, could be entitled to damages in inverse condemnation.

facial challenge,[13] it is a necessary component of an as-applied analysis. See *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 19, 829 P.2d 765 (1992) (court must know nature and extent of permitted development before adjudicating constitutionality of regulations that purport to limit it) (citing *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351, 106 S. Ct. 2561, 91 L. Ed. 2d 285 (1986)), *cert. denied by Robinson v. City of Seattle*, 506 U.S. 1028 (1992); *Presbytery*, 114 Wn.2d at 337 (exhaustion necessary to as-applied challenge because court cannot determine whether regulation is unduly oppressive without knowing to what uses the property can be legally put). Without a final decision by the County regarding the extent to which Troy could have developed her property, we cannot evaluate whether the WMR diminished the property's value. See *Ventures Northwest Ltd.*, 81 Wn. App. at 368 (final decision is necessary to an inverse condemnation claim because court must compare the present value of the regulated property with the property's value before imposition of the regulation).

Moreover, Troy obtained authority to construct a single family home, which is all that her original application proposed. Any diminution in value to the property caused by the WMR's restrictions on agricultural and livestock uses cannot be evaluated because Troy failed to follow the procedures provided by the WMR to allow for such uses. See PCC 17.12.070 (allowing buffer widths to be modified by averaging, reducing, or increasing); PCC 17.12.090 (reasonable use exception for regulated activities); PCC 17.12.130(D) (permitting agricultural activities in a buffer if applicant demonstrates that all adverse impacts will be mitigated). Likewise, her claim that she has lost the value of the buildable western portion of her property because access to that area is cut off

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[13] See *Bare v. Gorton*, 94 Wn.2d 380, 382-83, 526 P.2d 379 (1974) (exhaustion unnecessary where issue raised is the constitutionality of the law sought to be enforced).

by the wetland is not ripe; Troy never submitted a site plan proposing development on the western portion or attempted to obtain a reasonable use exception to build a road across the wetland. Troy's inverse condemnation claim was therefore properly dismissed.

3. RCW 64.40

RCW 64.40.020 allows a property owner who has applied for a permit to bring an action for damages against an agency for arbitrary, capricious, or unlawful acts. RCW 64.40.010-.020. The "act" upon which the lawsuit is based must be "a final decision by an agency which places requirements, limitations, or conditions upon the use of real property in excess of those allowed by applicable regulations in effect on the date an application for a permit is filed." RCW 64.40.010(6).

Troy based her claim upon three "acts:" (1) PALS's Wetland Approval, which conditioned final approval upon compliance with the WMR; [14] (2) the County's refusal to purchase Troy's property in 1995 with funds provided through its Conservation Futures Program; and (3) the County's "unlawful and unconstitutional interference with her reasonable use of her property[.]" Clerk's Papers at 11. Only the first event qualifies as an "act" under the statute. The County's refusal to purchase Troy's property placed no conditions or limitations upon her ability to use it, and the County's "unlawful and unconstitutional interference" with her use is not a final decision.

Regarding the wetland approval, the trial court found: "The County has not placed 'requirements, limitations or

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[14] Troy's wetland approval is a "permit" within the meaning of the statute. RCW 64.40.010(2) (... "'Permit' means any governmental approval required by law before an owner ... may ... put real property to use.").

conditions upon the use of [Troy's] real property in excess of those allowed by applicable regulations[.]' . . . The County has only required Ms. Troy to comply, and not vary from with [sic] applicable regulations[.]" Clerk's Papers at 109. We will not overturn a trial court finding of fact if it is supported by substantial evidence in the record. *Cox v. City of Lynnwood*, 72 Wn. App. 1, 10, 863 P.2d 578 (1993). Here, the record amply supports the finding of the trial court. The conditions enumerated in Troy's wetland approval are requirements expressly set forth in the WMR. See PCC 17.12.040; . 140(D); . 140(E)(2). The claim was properly dismissed.

4. Section 1983

Troy asserts that the "acts" outlined above constitute a violation of her civil rights, giving her a cause of action under 42 U.S.C. § 1983.[15] To obtain damages under section 1983, a plaintiff must prove: (1) the defendant deprived the plaintiff of rights secured by either the constitution or the laws of the United States; and (2) the defendant acted under color of state law. *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 117, 829 P.2d 746 (1992), *cert. denied*, 506 U.S.1079 (1993); *American Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d, 1, 12, 802 P.2d 784 (1991).

Troy fails to explain the basis of her section 1983 action. Presumably, she relies upon her takings and due

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[15] Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation . . . of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the depri vation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]

42 U.S.C. § 1983.

process claims. As discussed above, Troy lacks standing to pursue her takings claim. But she may obtain damages for a due process violation by showing invidious or irrational conduct on the part of the County. *Sintra*, 119 Wn.2d at 23 (money damages available where due process violation is based upon an invidious or irrational land use decision) (citing *R/L Assocs., Inc. v. City of Seattle*, 113 Wn.2d 402, 412, 780 P.2d 838 (1989) (quoting *Harding v. County of Door*, 870 F.2d 430, 431 (7th Cir.), *cert. denied*, 493 U.S. 853 (1989)); *Cox*, 72 Wn. App. at 9 (substantive due process is denied under section 1983 if a local jurisdiction makes a land use decision irrationally, arbitrarily, and capriciously, and its decision utterly fails to serve a legitimate governmental purpose or was tainted by improper motive) (citing *Robinson v. City of Seattle*, 119 Wn.2d 34, 61-62, 830 P.2d 318, cert. denied, 506 U-S. 1028 (1992)).

As discussed above, the County has not engaged in irrational conduct; it has merely required Troy to comply with the applicable regulations. Therefore, Troy's section 1983 claim was properly dismissed.

5. Impairment of Contract

Troy further asserts that the County's "unlawful and unconstitutional interference with her reasonable use of her property", Clerk's Papers at 11, impairs her land purchase contract, in violation of the Washington and U.S. Constitutions.[16] Troy argues that the WMR provision requiring wetland owners to place the wetland in a separate wetland

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[16] Article 1, section 23 of the Washington Constitution provides: "No ... law impairing the obligations of contracts shall ever be passed." Article 1, section 10 of the U.S. Constitution states: "No State shall ... pass any ... Law impairing the Obligation of Contracts. . . ." U.S. Const. art. I, § 10, cl. 1.

tract, protective easement, or public or private land trust would result in a conveyance to the County and an unlawful subdivision of property that would breach her land purchase contract. But the County never enforced this provision against Troy. It is not included as a precondition to her final wetland approval. Dismissal of Troy's contract claim was therefore proper.

6. Attorney Fees

Because the trial court properly dismissed Troy's claims, we deny her request for attorney fees on appeal.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

s/ *Houghton, J.*
Houghton, J.

We concur:

s/ *Morgan, J.*
Morgan, P.J.

s/ *Seinfeld, J*
Seinfeld, J.

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Filed
In County Clerk's Office
A.M. MAY 01 P.M
Pierce County, Washington
Ted Rutt, County Clerk
By s/_____ Deputy

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

CHERI TROY, Petitioner/Plaintiff v. PIERCE COUNTY, Respondent/Defendant.	NO. 98 2 03774 7 JUDGEMENT AND ORDER DISMISSING PETITIONER'S ACTION

THIS MATTER having come before the Honorable Judge Sergio Armijo of the of the above entitled Court and the parties having appeared by and through their attorneys of record, Respondent/Defendant Pierce County (County), through its attorneys, John W. Ladenburg, Pierce County Prosecuting Attorney, and Eileen M. McKain, Deputy Prosecuting Attorney, and Petitioner/Plaintiff Cheri Troy, through her attorney Barnett N.Kalikow, NOW THEREFORE, the Court enters the following:

I. Summary of Findings and Conclusions.

1. Petitioner filed this action under the Land Use Petition Act (LUPA), Chapter 46.70C RCW; a state property

rights provision, Chapter 64.40 RCW; and the Federal Civil Rights Act; 42 U.S.C. 1983.

2. Both LUPA and Chapter 64.40 RCW require the Petitioner to exhaust her administrative remedies before going to Court. The Federal Civil Right Act requires Petitioner to 1) timely file an appeal and 2) appeal from a final or "ripe" determination.

3. In challenging two separate County actions, Petitioner has failed the "exhaustion," "ripeness," and time requirements. The first challenged action was the County's wetland approval issued almost four years ago. In her response, Petitioner admits that she did not administratively appeal the wetland approval, but waited approximately three and half years to file this Superior Court action. Therefore, Petitioner has conceded that she failed to exhaust her administrative remedies, and failed to timely file this appeal.

The second action is the County's denial of a variance. The County denied the variance because Petitioner did not meet the criteria and could accomplish what she wanted to accomplish by complying with the regulations and completing the reasonable use application process. In her response, Petitioner admits that she refused to complete the administrative process and therefore, failed to exhaust her administrative remedies or get a "final" decision from the County.

4. Petitioner offers several excuses for her omissions. None of the excuses cure the legal defects described above. Petitioner must exhaust her administrative remedies to bring an "as applied" constitutional challenge and Petitioner has not done so. Petitioner must demonstrate that the County has denied her "all economically viable use of any parcel of regulated land" to bring, a "facial" constitutional challenge and Petitioner has not done so. Presbytery of Seattle v. King County, 114 Wash.2d 320, 333, 787 P.2d 907,

cert. denied, 498 U.S. 911, 1ll S.Ct. 284, 112 L.Ed.2d 238 (1990).

Petitioner was afforded notice and an opportunity to administratively appeal, but failed to do so, thus failing to exhaust her administrative remedies. Even if she were not afforded notice and an opportunity to administratively appeal, the issues presented would not be "ripe" for review and would be dismissed. The administrative remedies were not futile.

The County has not placed "requirements, limitations, or conditions upon the use of real property in excess of those allowed by applicable regulations in effect on the date an application for a permit is filed" and therefore, has not violated any of Ms. Troy's state rights under Chapter 64.40 RCW. The County has only required Ms. Troy to comply, and not vary from with applicable regulations, including the Wetland Management Regulations.

II. Judgement and Order.

1 Petitioner's entire action, including, the actions brought under the Land Use Petition Act, Chapter 36.70C RCW; a state property rights provision, Chapter 64.40 RCW; and the Federal Civil Rights Act, 42 U.S.C. 1983, is DISMISSED with prejudice and without costs.

DONE IN OPEN COURT this 1st day of May, 1998.

s/ Sergio Armijo
JUDGE

JOHN W.LADENBURG
Prosecuting Attorney

By *s/ Eileen McKain*
EILEEN MCKAIN, WSB #17792
Deputy Prosecuting Attorney
Attorneys for Pierce County

LAW OFFICES OF BARNETT N. KALIKOW
By: *s/ Barnett N. Kalikow*
Barnett N. Kalikow, WSB #16907
Attorney for Petitioner/Plaintiff

Pierce County
Office of the Pierce County Hearing Examiner
Stephen K. Causseaux, Jr.
Pierce County Hearing Examiner

902 South 10th Street
Tacoma, Washington 98405
(206) 272-2206

December 23, 1997

Cheri Troy
P.O. Box 359
McKenna, WA 98558

RE: WETLAND VARIANCE: CASE NO. WV1-97

Dear Applicant:

Transmitted herewith is the Report and Decision of the Pierce County Hearing Examiner relating to the above-entitled matter.

Very truly yours,
s/ *Stephen K. Causseaux, Jr.*
STEPHEN K. CAUSSEAUX, JR.
Hearing Examiner

SKC/ca
cc: Pierce County Planning
Pierce County Development Engineering
Pierce County Building Division
Pierce County Public Works and Utilities
Tacoma-Pierce County Health Dept.
Fire Prevention Bureau
Pierce County Parks and Recreation
Pierce County Council
Pierce County Resource Management

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OFFICE OF THE HEARING EXAMINER

PIERCE COUNTY

REPORT AND DECISION

CASE NO.: WETLAND VARIANCE: Case No. WV1-97

APPLICANT: Cheri Troy
P.O. Box 359
McKenna, WA 98558

SUMMARY OF REQUEST:

The applicant has proposed a site development plan which would result in unmitigated impacts to the identified wetland and buffer within the site. The Wetland Management Regulations (WMR) #91-0128S3 provide guidance to an applicant regarding the actions to take in this situation. The applicant is requesting a variance to the WMR in order to be allowed to pursue the preferred site development plan without having to follow the requirements of the WMR. The site is located at 35818 62nd Ave., McKenna, in the NE 1/4 of Sec. 26, T17N, R2E, W.M., in Council District #3.

SUMMARY OF DECISION:

Request denied.

PUBLIC HEARING:

After reviewing, Planning and Land Services Report and examining available information on file with the application, the Examiner conducted a public hearing, on the request as follows:

The hearing was opened on November 13, 1997, at 1:00 p.m.

Parties wishing to testify were sworn in by the Examiner.

The following exhibits were submitted and made a part of the record as follows:

EXHIBIT "1" - Planning and Land Services Staff Report and Attachments

EXHIBIT "2" - Barnett N. Kalikow's brief

EXHIBIT "3" - Letter from Diane Ryba to Jeff London and Cheri Troy dated August 22, 1994

EXHIBIT "4" - Master Application

EXHIBIT "5" - Letter from Marion Carey to Jeff London and Cheri Troy dated June 24, 1993

EXHIBIT "6" - Letter from Marion Carey to Jeff London and Cheri Troy dated September 7, 1993

EXHIBIT "7" - Site Plan dated July 21, 1994

EXHIBIT "8" - Photos

EXHIBIT "9" - Letter submitted by Edward Hemingway

EXHIBIT "10" - Letter from Edward Jones Hemingway re: illegal logging

EXHIBIT "11"- Recorded instrument example

EXHIBIT "12"- Delineation of site chart

EXHIBIT "13"- Petitioner's Memorandum of points and Authorities dated November 2l, 1997

EXHIBIT "14"- Letter from Dave Risvold to Examiner dated November 24, 1997

DAVE RISVOLD appeared and presented the Planning Division Staff Report. The variance from WMR requirements is requested to allow a single family dwelling and agricultural uses, but does not meet the criteria. The applicant has shown nothing specific about the property that would require a variance. The wetland buffer can be modified and a construction corridor allowed through the wetland. The applicant must mitigate the impacts and if she doesn't, the proposed improvements would result in adverse impacts to the wetland and would not be in accordance 'with the health, safety, and welfare.

Appearing was BARNETT N. KALIKOW, attorney, at law, on behalf of the applicant who stated that the County is requiring the applicant to convey specific property rights to the County without compensation. Furthermore, the applicant does not have access to an upland area and wants to use the high ground through the wetland for access. The County has told her that she would not get permission, and she wants the variance to allow the road subject to conditions. She also desires a slight reduction in the buffer area so that she can plant crops and install a septic drainfield, but the County will not allow a drainfield in the buffer area. The letter from the County says that the applicant can try, but that it will be expensive and she will not get the reasonable use exception. He then introduced Exhibit 2, his brief, and Exhibit 3, a letter from Diane Ryba. The wetland location

The conveyance must be signed and recorded. To build outside the wetland buffer, she must sign over any use of the wetland. Land use restrictions can't be used to deny a road to one's own property. The government is exercising property rights as an owner as evidenced by the December 2 letter. The applicant could put a mound system in but could not extend a pipe to the other side of her property. She does everything at her own risk to include hiring, an expert and spending money.

Appearing was CHERI TROY, the applicant, who referred to RCW 36.70A and the taking of private property, She also referred to WAC 305-190-040 which states that the designation of a parcel as wetland and buffer doesn't change the right to use the property. Since there is a taking, she chose the variance as specified by code. The County wants to enforce WMR 17.40.040 but such enforcement should be subject to federal and state laws which apply. She purchased her property in September, 1991, and tried to establish fencing and build a home. She planted fir trees and prepared for animals. One can walk across the wetland all year round as it creates no barrier to access. The original plan was for the home in the upland area. No fish or wetland animals or birds are within the wetland. On January 26, 1993, she started the permit process for a single family dwelling. In 1993, a wetland was identified in the comer, and Exhibit 4 shows the original application and wetland location. When she said no animals, she was talking about the southwest comer. In March, 1993, the County said other wetlands were on the site and needed to be delineated with a buffer. She bought the property in 1991. The June, 1993, letter is Exhibit 5. She then referred to a September 7, 1991, letter as Exhibit 6. She changed the site plan and moved everything outside of the buffer (Exhibit 7). She referred to an August 22, 1994, letter and stated that she should have been granted the permit without restrictions. Pursuant to the letter, she was cut off from access to

the west side of her property. The County cuts off access with its restrictions, and she can't use the blue-green portion on the site plan or even provide access between the two upland areas. Access is taken to the northwest and no other areas are available. She must install posts along the wetland buffer boundary and record the site plan, the buffer location, etc., post a wetland buffer notice. The wetland approval is not issued. She must revise the title to her land. Her property is also impacted by a 25 foot wide setback from the road in addition to the the wetland and its buffer. The hardship is that she can't get to a portion of her lot or use the center of her lot. Even if she did everything required by the Reasonable Use Exception, the County has implied that she can't use the balance of the 3.5 acres. She can't use the wetland for her ducks and geese or to mitigate her mosquito problem. She must put up with the signs and the weeds in the wetland buffer, has lost control of her property, and needs Pierce County's permission for anything. She has lost the development rights to her property, the right to have animals, and the right to farm it. She cannot cut her trees, and therefore has no wood. Such prevents her from paying off her contract onto the land. The County is withholding her permits and now she cannot even move on the land. She is concerned about liability as she cannot even remove hazards. She then introduced Exhibit 8, photographs of the site.

Reappearing was MR. KALIKOW who stated that when the instruments are recorded, the property is conveyed as a deed to the County. She should have a variance from the setback. Why does a buffer need a buffer? The County now owns her property. The County has authority to regulate, but not to dispose of all of her rights including the deeding of her property. She wants to vary from the code to disallow the recording. The code can't be constitutionally applied the way the County is doing it. This section of the code is unconstitutional. As applied, it says that the wet

land must be protected but requires the landowner to do it. If the County wanted to do it, then okay, but to demand a deed is not a constitutional application. The Examiner has authority to say that the County's application of the ordinance is unconstitutional.

Upon questioning MR. RISVOLD, MR. KALIKOW solicited the following responses. He does not know if the wetland is continuous or if it is a mosaic of pocket wetlands. They are so close together that any road would probably invade some wetlands. There is some high ground, but not enough for a road. Mr. Kalikow then continued by stating that Ms. Troy is asking for very minimal relief, but the County, is unwilling to work with her. Their letter made it clear they won't help, and are in essence saying you hire the experts and come to see us, but we won't grant the permit. Since she can't put in a road, she probably can't put in a septic pipe. To avoid injury and within the variance criteria, the Examiner has the authority to allow her to put in the road and septic pipe as it is it is consistent with the zoning.

Appearing was EILEEN McKAIN, deputy prosecution attorney, who stated that the applicant wants three things plus a fourth which is road access. The County, is not requiring a deed. WMR 17.12.140 requires a notice on the title which would provide notice of the wetland to future purchasers, but is not a conveyance. Concerning access to the upland portion, no one has restricted walking or other access and the County doesn't intend to. The question is whether the applicant can conduct regulated activities within the wetland. Regulated activities cannot occur unless a variance or reasonable use exception is granted. Access has been restricted, but such does not deny property rights. Exhibit 3 shows where PALS identified a building envelop and drainfield and also noted a potential building site on the northwest portion. Ms. Troy agrees with the site plan but she objects to the notice on the title. Her complaint is the

same - she had no notice of the wetland. The access would go from the northwest to the northeast and would cut through the property, and she needs to show the special circumstances for the reasonable use criteria and has not done so. There is nothing special about the property or about the notice. She can build a house on the property. PALS attempted to assist her in many areas.

Reappearing was MR. KALIKOW who once again referred to the notice and stated that subsection E states that prior to final approval, the wetland and buffer shall be placed in separate tracts. It is a specific requirement. The document to be recorded has a long list of things that can't be done including marking, etc., of the boundary. It is a deed. Ms. McKain reappeared to state that the County is not using subsection E, but is just simply asking, for notice.

No one spoke further in this matter and so the Examiner took the request under advisement and the hearing was concluded at 2:55 p.m.

NOTE: A complete record of this hearing, is available in the office of Pierce County Planning and Land Services.

FINDINGS, CONCLUSIONS AND DECISION:

FINDINGS:

1 The Hearing Examiner has admitted documentary evidence into the record, viewed the property, heard testimony, and taken this matter under advisement.

2 Notice of this variance request was advertised in accordance to Chapter 1.22 of the Pierce County Code. Notice of the date and time of hearing was published two (2) weeks prior to hearing in the official County

newspaper. Property owners within 300 feet of the site were sent written notice. The site has been posted.

3. The applicant has a possessory ownership interest in a rectangular, five acre parcel of property located at 35818-62nd Avenue, McKenna. The site is near the intersection of 62nd Avenue and 360th Street, approximately .8 miles from Harts Lake Road. The applicant purchased the parcel in 1991, and when attempting to construct a single family residential dwelling and establish agricultural uses on the site, discovered a linear wetland bisecting the property from north to south.

4. Pursuant to the applicant's request, a Pierce County wetlands biologist delineated the wetland and categorized it as a Category II wetland. The biologist described the wetland as a large, forested, scrub-shrub system which separates the upland areas on the east and west portions of the site.

5. Following several consultants with Pierce County Staff, the applicant received wetland approval (Exhibit 1G) for a site plan showing a building and septic drainfield located on the east side of the parcel outside of both the wetland buffer and eight foot building setback. Said site plan reflected no improvements within the wetland or buffer and no access to the upland portion of the site on the west side of the wetland. The wetland approval was subject to the applicant recording a buffer notice as required by the Pierce County Wetland Management Regulations (WMR), the conditions of wetland approval, and the approved site plan. One condition of approval required the applicant to mark the edge of the wetland buffer with clearly visible, durable markers placed approximately every 30 feet pursuant to Section 17.12.120(C)WMR.

6. The applicant elected not to implement the approved site plan, but to apply for a variance to the requirements of the WMR.

7. Following a review of the applicant's presentation at the hearing and the application for variance, the Examiner is unsure as to the applicant's exact request. The document attached to the variance application and entitled "Owner's Original Land Use Program" reflects a single family dwelling within the wetland buffer, an artificial water pond within the wetland, pasture and fruit trees within the wetland and buffer, a water bird shelter within the wetland, an animal barn/shelter or house garden site within either the wetland or buffer, and a second animal barn and chicken coop/shed within either the wetland buffer or wetland itself (Exhibit 1B). At the hearing the applicant requested a variance from the County's alleged requirement to convey the wetland and buffer to Pierce County; to allow construction of a driveway and septic line through the wetland to the western upland portion of the site (where permeable soils suitable for septic drainfields are located); and a reduction in the wetland buffer to allow increased agricultural uses.

8. At the hearing, the applicant also challenged the constitutionality of the County's interpretation and enforcement of the WMR. In her Memorandum Of Points and Authorities filed subsequent to the hearing, the applicant agreed that the Examiner did not have authority to declare the WMR unconstitutional, but asserted that the County's interpretation and enforcement of the WMR was unconstitutional, and that the Examiner can declare that a certain application of the WMR violates constitutional rights pursuant to Prisk v. City of Poulsbo, 46 Wn. App 793 (1987). The applicant therefore challenges the constitutionality of the

County's interpretation of the WMR, but acknow-l ledges that the Examiner does not have authority to declare the WMR facially unconstitutional. The applicant states that one purpose of the variance request is to provide the Examiner the opportunity to prevent an unconstitutional interpretation and application of the WMR.

9. In addressing the constitutional issues, it is initially noted that Section 17.12.010 sets forth the purpose of the WMR which is to avoid, or in appropriate circumstances minimize, rectify, reduce, or compensate for impacts to wetlands caused by, land development. The purpose of the WMR is summarized by the final sentence of said section:

> When avoiding impacts is not reasonable, mitigation should be implemented to achieve no net loss of wetland in terms of acreage, function, and value.

The applicant does not argue with the boundaries of the wetlands as delineated by the wetlands biologist, nor does the applicant contest that said wetlands are Category Il wetlands as defined by Section 17.12.030(B) WMR:

> Category II wetlands are those regulated wetlands of significant resource value based on significant functional value and diversity, wetland communities of infrequent occurrence, and other attributes which may not be adequately replicated through creation or restoration.

10. Section 17.12.070(A) WMR requires a I00 foot buffer from the boundary of a Category II wetland, and Section 17.12.070(E) WMR requires a building setback line of eight feet from the edge of a wetland buffer.

Section 17.12.080(B) WMR allows access roads, utility lines, and utility poles within Category II wetland buffers under certain conditions, but subsection D requires a reasonable use exception for regulated activities within Category II wetlands themselves. Section 17.12.140(B) WMR requires a notice on title when activities not exempted by the WMR are proposed, and subsection E requires placement of wetlands and buffers in a separate wetland tract or similarly preserved through an appropriate permanent protective mechanism as determined by Pierce County. In the present case, Pierce County has determined that recording the notice, the wetland conditions, and the site plan as set forth in Exhibit 1 (the August. 22, 1994, letter from Diane Ryba) is sufficient to protect the wetlands.

11. The applicant is requesting a variance to authorize an access road or driveway and on-site septic disposal system sewage line through the wetland and buffers. Such would allow vehicular access from the eastern upland portion to the western upland portion of the site, and a conventional drainfield system in the western upland for the house in the eastern upland. Section 17.12.080(D)WMR specifically authorizes regulated activities within Category II wetlands and buffers when an applicant applies for and receives a reasonable use exception. Thus, the WMR itself provides authority for the applicant to construct the contemplated improvements through the wetland and buffers without the necessity of a variance. Requiring the applicant to obtain a reasonable use exception is not an unconstitutional interpretation of the WMR.

12. The applicant is also requesting a variance to the requirement of recording the wetland conditions and the notice on title of the existence of wetlands. Section 17.12.140(D) requires the following "Notice On Title"

when an applicant proposes non-exempt activities within wetlands or buffers:

> This property contains wetlands or wetland buffers as defined by Pierce County Code 17.12. Restrictions on use or alteration of the wetland buffers may exist due to natural conditions of the property and resulting regulation.

Requiring the applicant to provide notice of the existence of Category II wetlands to potential purchasers of the property is not an unconstitutional interpretation of said section. The applicant complained at the hearing that no notice was provided to her of the existence of wetlands, and such notice will prevent future complaints. The notice requirement is consistent with RCW 64.06 which requires a formal disclosure statement in residential real property transfers. Furthermore, while not specifically required by the WMR, recording the wetland conditions serves to protect the wetland and buffer and provide additional notice to prospective purchasers. The wetland conditions required by the County are recitations of the regulated activities set forth in Section 17.12.040 WMR, the exemptions set forth in Section 17.12.050 WMR, and the requirements for new agricultural activities set forth in Section 17.12.130 WMR. Declaring the wetland conditions or the recording thereof unconstitutional would require the Examiner to find the WMR facially unconstitutional.

13. The applicant is also requesting a variance to allow reduction of the 100 foot wide buffer required for Category II wetlands in Section 17.12.070(A)WMR. Section 17.12.070(B)WMR states that buffer widths may be reduced in accordance with the criteria set forth therein. Furthermore, Section 17.12.130 WMR allows an applicant to initiate new agricultural activities within both a

wetland buffer and the wetland itself subject to the requirements of subsection D. A finding that the County's requirement of a 100 foot buffer width is unconstitutional would require a finding that the WMR are facially unconstitutional.

14. The applicant has elected to bypass the provisions of the WMR which authorize the regulated activities she proposes in the wetland and wetland buffers subject to criteria designed to minimize and mitigate impacts, and to request a wetland variance pursuant to the authority set forth in Section 17.12.160 WMR, thereby avoiding, such minimization and mitigation. To obtain a wetland variance, the applicant must establish that the request satisfies the criteria set forth in Section 17.12.160(C) WMR. Findings on each criteria are hereby made as follows:

A. The applicant has shown no special circumstances applicable to her property such as shape, topography, location, or surroundings that do not apply generally to other properties within Pierce County. The rectangular, five acre parcel is bisected by a swale which contains wetlands. Many parcels throughout Pierce County are encumbered by such swales and associated wetlands. The fact that the applicant's property contains a wetland does not constitute a special circumstance.

B. The wetland variance is not necessary for the preservation and enjoyment of a substantial property right possessed by other similarly situated property, but which because of special circumstances is denied to the applicant's parcel. As previously found, the applicant has not established that special circumstances apply to her property. Furthermore, the WMR authorizes all activities proposed by the appli-

cant subject to obtaining various permits. A wetland variance is not necessary to allow what the WMR already authorize.

C. Granting the wetland variance will be materially detrimental to the public welfare, but not injurious to the property or improvements. Granting a wetland variance would essentially authorize regulated activities within wetlands and wetland buffers without the necessity of minimization and mitigation. Such would thwart the County Council's policy of first avoiding impacts, but if such is not possible, to require mitigation so as to achieve no net loss of wetlands.

D. Granting the variance will violate, abrogate, and ignore the goals, objectives, and policies of the Pierce County Wetland Management Policies. As previously found, granting the wetland variance will allow the applicant to conduct regulated activities within the Category II wetland and its buffer without avoiding impacts and without providing mitigation to achieve no net loss of wetlands in terms of acreage, function, and value. Such would also allow regulated activities within a wetland without obtaining a reasonable use exception and/or other applicable permits.

15. The applicant has also argued that the costs of compliance with WMR criteria are prohibitive, and that she cannot afford to hire wetland specialists and implement a significant wetland mitigation plan. The applicant presented no cost estimates or scope of work proposals associated with a reasonable use exception, buffer reduction, or the introduction of new agricultural activities within the buffer and/or wetland. However, even if she had, the WMR do not authorize the Examiner to consider economic impact, and the County Council has

not adopted any economic criteria. Consideration of financial statements to determine wetland mitigation on a case by case basis is not appropriate nor authorized.

CONCLUSIONS:

1. The Hearing Examiner has jurisdiction to consider and decide the issues presented by this request.

2. The applicant has not established her burden of showing that the variance request satisfied the criteria set forth in Section 17.12.160 (C) WMR.

3. The applicant has not established that Pierce County Planning and Land Services is interpreting the WMR in an unconstitutional manner. A finding that the County's actions are unconstitutional requires a finding that the WMR are facially unconstitutional which is beyond the Examiner authority pursuant to Prisk v. Poulsbo, supra.

4. The request for a wetland variance should be denied.

DECISION:

The request for a wetland variance to allow regulated activities within a Category II wetland and buffer is hereby denied.

ORDERED this 23rd day of December, 1997.

s/ Stephen K. Causseaux, Jr.
STEPHEN K. CAUSSEAUX, JR.
Hearing Examiner

TRANSMITTED this 23rd day of December, 1997, to the following:

C 17

APPLICANT:	Cheri Troy P.O. Box 359 McKenna, WA 98558	
Barnett Kalikow	407 Adams Street, Suite 207	Olympia, WA 98502
Dave Shaw	6202 SR-702 So.	Roy, WA 98580
Lester Charnley	P.O. Box 424	Roy, WA 98590
Ed Hemingway	20832 76th Ave. W. 41-	Edmonds, WA 98026
Earnest Rheault	P.O. Box 537	Roy, WA 98580
Alma Stewart		

PIERCE COUNTY PLANNING AND LAND SERVICES
PIERCE COUNTY BUILDING DIVISION
PIERCE COUNTY DEVELOPMENT ENGINEERING DEPARTMENT
PIERCE COUNTY PUBLIC WORKS AND UTILITIES DEPARTMENT
TACOMA-PIERCE COUNTY HEALTH DEPARTMENT
FIRE PREVENTION BUREAU
PIERCE COUNTY PARKS AND RECREATION
PIERCE COUNTY COUNCIL
PIERCE COUNTY RESOURCE MANAGEMENT

CASE NO. WETLAND VARIANCE: CASE NO. WV1-97

NOTICE

1. **RECONSIDERATION**: Any aggrieved person feeling that the decision of the Examiner is based on errors cf procedure or errors of misinterpretation of fact may make a written request for review by the Examiner. The request must be filed with the Planning and Department with a reconsideration fee as required by the Department of Planning and Land Services, and filed not later than 4:30 p.m. on January 5, 1998 , with the Planning Department.

This request shall set forth the alleged errors or misinterpretations, and the Examiner may, after review of the record, take such further action as he deems proper and may render a revised decision.

2. **APPEAL OF EXAMINER'S DECISION**: The final decision by the Examiner may be appealed in accordance with the Land Use Petition Act, Chapter 347, Laws of 1995, Sections 701-719, and Pierce County Ordinance No. 95-112.

NOTE: In an effort to avoid confusion at the time of filing a request for reconsideration, please attach this page to the request for reconsideration.

D 1

FILED
COURT OF APPEALS
DIVISION II
99 NOV -3 AM 10:30
STATE OF WASHINGTON
BY s/
DEPUTY

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

DIVISION II

CHERI TROY, Appellant, v. PIERCE COUNTY, Respondent.	No. 23374-6-II ORDER DENYING MOTION TO RECONSIDER

APPELLANT moves for reconsideration of the court's decision terminating review, filed October 1, 1999. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

DATED this 3rd day of November, 1999.

FOR THE COURT: s/
PRESIDING JUDGE

Cheri Troy
P.O. Box 474
Roy, WA 98580

Jill Guemsey
Pierce Co Pros Atty
955 Tacoma Ave South
Room # 301
Tacoma, WA 98402-2160

D 2

FILED
SUPREME COURT
STATE OF WASHINGTON
00 MAY 3 A 8:35
BY C. J. MERRITT
CLERK

THE SUPREME COURT OF WASHINGTON

CHERI TROY,	)	
	)	NO. 68900-8
Petitioner,	)	
	)	**ORDER**
v.	)	
	)	C/A NO. 23374-6-II
PIERCE COUNTY,	)	
	)	
Respondent.	)	

Department II of the Court considered this matter at its May 2, 2000, Motion Calendar, and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 3rd day of May, 2000.

s/ *Richard P. Guy*
CHIEF JUSTICE

Chapter 58.17
PLATS–SUBDIVISIONS–DEDICATIONS

[RCW] 58.17.030 Subdivisions to comply with chapter, local regulations. Every subdivision shall comply with the provisions of this chapter. Every short subdivision as defined in this chapter shall comply with the provisions of any local regulation adopted pursuant to RCW 58.17.060.

[RCW] 58.17.300 Violations–Penalties. Any person, firm, corporation, or association or any agent of any person, firm, corporation, or association who violates any provision of this chapter or any local regulations adopted pursuant thereto relating to the sale, offer for sale, lease, or transfer of any lot, tract or parcel of land, shall be guilty of a gross misdemeanor and each sale, offer for sale, lease or transfer of each separate lot, tract, or parcel of land in violation of any provision of this chapter or any local regulation adopted pursuant thereto, shall be deemed a separate and distinct offense.

Chapter 64.40
PROPERTY RIGHTS–DAMAGES FROM GOVERNMENTAL ACTIONS

[RCW] 64.40.020 Applicant for permit–Actions for damages from governmental actions. (1) Owners of a property interest who have filed an application for a permit have an action for damages to obtain relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority, or relief from a failure to act within time limits established by law: PROVIDED, That the action is unlawful or in excess of lawful authority only if the final decision of the agency was made with knowledge of its unlawfulness or that it was in excess of lawful authority, or it should reasonably have been known to have been unlawful or in excess of lawful authority.

Wetland Management Regulations

[PCC] 17.12.010 Purpose.
" * * *The purpose of these regulations is to * * *maintain and enhance the biological and physical functions and values of wetlands with respect to * * * stormwater and floodwater storage and conveyance, fish and wildlife habitat, primary productivity, recreation, education, and historic and cultural preservation. * * * "

[PCC] 17.12.020 Definitions.
AK. ""Wetland" or "wetlands" means areas that are inundated or saturated by surface water or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. * * * "

[PCC] 17.12.040 Regulated Activities.
A. "Compliance with these regulations does not remove an applicant's obligation to comply with applicable provisions of any other Federal, State, or local law or regulation. * * * "

[PCC] 17.12.180 Complaince Provisions.
A. "The Department shall have authority to enforce this Chapter, any rule or regulation adopted, and any permit, order or approval issued pursuant to this Chapter, against any violation or threatened violation thereof. The Department is authorized to issue civil infraction citations and administrative orders, levy fines, and/or institute legal actions in court. * * *"
B. 3. " * * * Each violation and, in the case of a continuing violation, each violation and each day of activity without a required approval shall be a separate and distinct violation. The civil penalty shall be assessed at a rate of two hundred fifty dollars per day per violation pursuant to PCC 1.16.120 A. * * * "

[PCC] 17.12.195 Assessment Relief.

C. "The Assessor-Treasurer's Office shall consider wetlands delineation under this Chapter in determining the fair market value of land. Any owner of an undeveloped wetland and/or buffer which has been placed in a separate wetland tract or tracts, protective easement, public or private land trust dedication, or other similarly preserved areas shall have that portion of land assessed consistent with those restrictions."

Pierce County
Department of Planning and Land Services

DEBORA A. HYDE
Director

2401 South 35th Street
Tacoma, Washington 98409-7460
(206) 591 7200 . FAX (206) 591 3131
August 22, 1994

Jeff London and Cheri Troy
PO Box 325
McKenna, Washington 98558

Dear Mr. London and Ms. Troy;

RE : Wetland Review for Placement of a Mobile Home; Located at 35818 62nd Avenue South; Parcel Number 021726-1-014; Wetland Application No. 149683

On August 17, 1994, Pierce County staff revisited your site with you to review the wetlands on or within 150 feet of your site, determine whether there was a building area east of the identified wetland, and whether there was access to the dry western part of the parcel. Based on our inspection, we determined that there is an available building envelope to the east, as shown on the enclosed site plan, and that wetlands on the parcel to the south appear to block access to the western portion.

As we discussed, there are a number of options you can pursue. The simplest is to confine your development to the indicated building envelope. Expanding the building area to the south would require clarification of the limits of the off-site wetlands to the south. This option assumes that the Tacoma-Pierce County Health Department will determine

that the soil in the area is suitable for a drainfield, after a high winter water table study. You should discuss other possible locations for, or designs of drainfields with them. For example, you may be able to get an easement on another parcel for the drainfield, which would give you more flexibility for the location of your house. Alternatively, it may be possible to place the drainfield in the western portion of the site, if mitigation is provided to repair the damage to the wetland caused by crossing the wetland for the drainfield installation.

If you are unable to find a suitable drainfield area and are thus unable to build in the identified building envelope, you may be able to locate your house elsewhere on the site. It appears that there is a large upland area suitable for building in the northwest corner of the site, but that no access is currently available. To pursue this area as a potential homesite, you would need to obtain an easement for access across adjacent land, either the parcel to the south, or the parcel to the west. During our site visit, we identified wetlands on the southern parcel that effectively block access from that direction. To cross the wetlands would require going through the Reasonable Use Exception process, which includes providing mitigation for unavoidable impacts to the wetland.

Using access other than that specified in the recorded Large Lot Subdivision would require an amendment to the recorded subdivision. This would require hiring an engineer and/or surveyor to prepare a new mylar showing the proposed change, and submitting it to the County for review and approval. The County's review fees for the process are approximately $340. For more information, please contact Mojgan Carlson at 591-7234.

Your current proposal is located outside the wetland and its buffer, and we are issuing your Wetland Approval (enclosed).

While it may look like a very lengthy set of conditions, its main purpose is to explain to you the various types of activties which are regulated in the wetland and its buffer.

To complete the Wetland Approval process, please complete the following steps:

1. Mark the edge of the buffer as required in Section 17.12.120(C) of the WMR. Permanent, clearly visible durable markers must be posted at the outer edge of the buffer. Markers should be placed about every 30 feet. The markers must state "Wetland Buffer Boundary" and may be mounted on metal or treated wood fence posts. You can install the markers yourself, or they can be installed by a consultant or licensed surveyor. After the markers are installed, please complete the enclosed affidavit, have it notarized, and sand it to Pierce County Planning and Land Services at the Pierce County Annex, 2401 South 35th Street, Tacoma, WA 98409-7494;

2. Fill out the enclosed wetland and/or Buffer Notice and have it noterized;

3. Bring your Wetland Approval into Pierce County Planning and Land Services and have it signed and dated by any Environmental Biologist in the office. Please call 591-3170 first to make sure someone will be available to help you; and

4. Have the following three items recorded on the title to the land at the Pierce County Auditor's Office:

    1. The Wetland and/or Buffer Notice;
    2. A copy of the Conditions of Wetland Approval; and
    3. A copy of the enclosed site plan.

Once you have recorded these items at the Auditor's Office, bring four copies of all three items and a copy of your receipt back to the Planning and Land Services Department.

This will complete the Wetland Approval process associated with the release of your Building or Site Development Permits. Please be advised that other County departments may have additional requirements which must be met, prior to the release of your permits, and that this approval is only good for three years from now, not from when you record the information. It is not necessary to record this information prior to your application for either a building permit or septic approval; however, you will need to record it before you can obtain permits. You may wish to have the Health Department review your drainfield design to get some idea of the feasibility of your project, before you spend additional time and money on other aspects of the planning process.

If you have any questions, please call me at 591-3197.

Sincerely,

s/ *Diane M. Ryba*

DIANE M. RYBA
Environmental Biologist

DKR:jm
Enclosures: Wetland Approval
Wetland and/or Buffer Notice
Site Plan
cc: Dan Drentlaw, AICP, Supervisor, Resource Management
Environmental Health Specialist, Tacoma-Pierce County Health Department

PIERCE COUNTY
PLANNING AND LAND SERVICES
2401 SOUTH 35TH STREET
TACOMA, WASHINGTON 98409

AFFIDAVIT OF POSTING FOR WETLAND BUFFER BOUNDARY SIGNS APPLICATION NO._____

I, _____ applicant/applicant's agent for the application number referenced above, being duly sworn on oath, deposes and says: That on the _____ day of _____19__, I posted ___ (number) Wetland Buffer Boundary signs, prominently displayed at the outer edge of the wetland buffer, at the site relating to the above-referenced application number as required by Pierce County Wetland Management Regulations.

_____
Signature

STATE OF WASHINGTON)
) SS
COUNTY OF)

Subscribed and sworn to before me this_____ day of _____, 19____.

_____
Notary Public in and for the State of Washington, residing at:

_____

NOTE: Photos documenting placement of the signs shall be submitted with the affidavit.

NOTE: This original affidavit must be returned to the Pierce County Planning and Land Services Department, West Division, as soon as the sign has been posted.

G 1

PIERCE COUNTY
PLANNING AND LAND SERVICES DEPARTMENT
WETLAND AND/OR WETLAND BUFFER NOTICE

Tax Parcel Number: 021726-1-014

Address: 35818 62nd Avenue South

Legal description:

Lot 2 of Large Lot Subdivision 2335

Formal subdivision, Short Plat, or Large Lot Map recording number:

Present owner: Betty Brown

Size of wetland and buffer areas (in square feet) located on the property: Undetermined

(Note: Do not include off-site wetland or buffer areas.)

	Category	On-Site Wetland Area	On-Site Buffer Area
Wetland A:	II	Undetermined	Undetermined

Others: (Please list an back of form.)

Total wetland and buffer area on-site; The wetland and buffer on this parcel have not been completely delineated or surveyed, and therefore the exact size and location are unknown.

NOTICE: This property contains wetlands or wetland buffers as defined by Pierce County Code 17.12. Restrictions on use or alteration of the wetlands or wetland buffers may exist due to natural conditions of the property and resulting regulations.

_____ _____

Date Signature of owner

Attachments 2:
Wetland Approval
Plat map or final binding site plan depicting the wetland and buffer areas (showing the delineation and calculated areas of any divisions of land and all wetland and wetland buffer areas, if applicable.)

STATE OF WASHINGTON)
)S
COUNTY OF PIERCE)

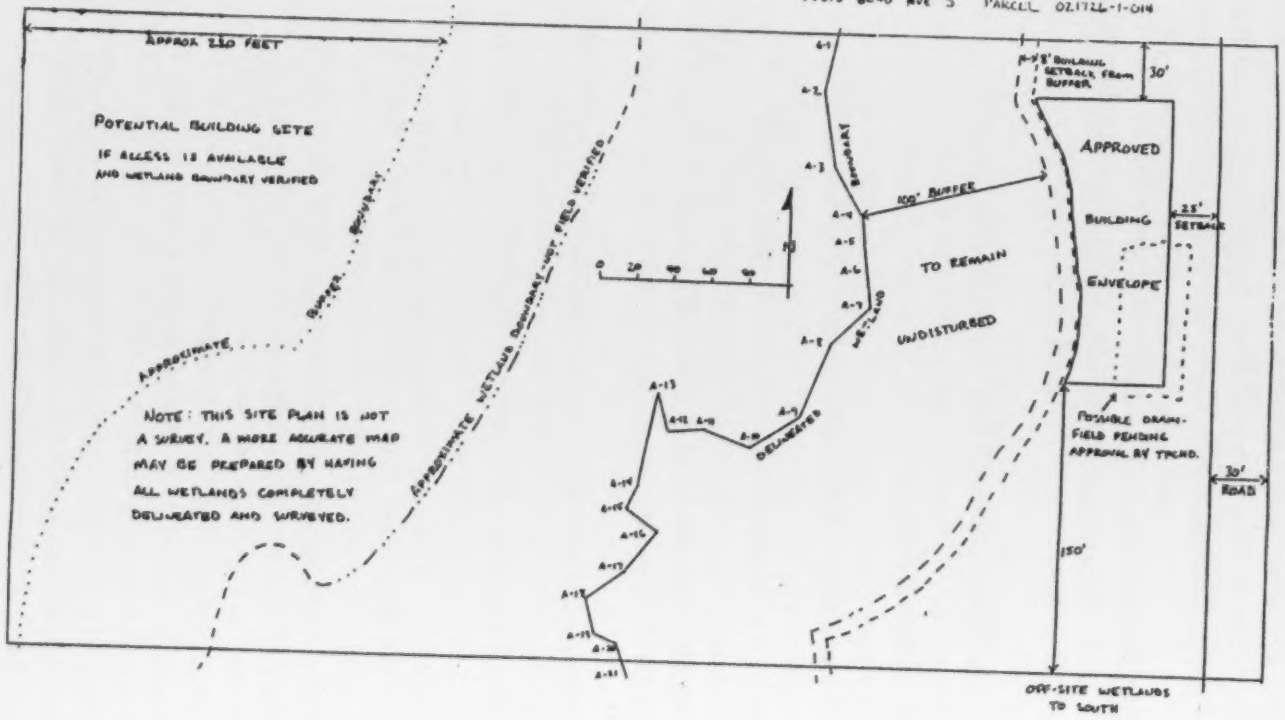
On this _____ day of _____ 19 __, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn personally appeared to me known to be the individual described in and who executed the foregoing instrument, and acknowledged to me that he/she/they signed and sealed the said instrument as a free and voluntary act and deed for the uses and purposes therein mentioned.

Given under my hand and official seal this ___ day of ____, 19____.

SEAL OR STAMP

_____
Notary Public in and for the State of Washington,
Residing at _____
My commission expires_____

SITE PLAN FOR NEW LOCATION AND CHECK TROY
35813 62ND AVE S PARCEL 0217224-1-014



G 3

G 4

CONDITIONS OF WETLAND APPROVAL
FOR
JEFF LONDON AND CHERI TROY

Project Description: Placement of mobile home and septic system on a parcel containing wetlands

Parcel Number 021726-1-014

Site Address: 35818 62nd Ave S

Date of Issuance:

Date by Which All Construction Must Be Complete:

The following conditions are based upon the site visits conducted by Pierce County Planning and Land services Department staff and the One-Family Dwelling and Agricultural Activities Application.

These conditions apply to the on-site wetland and undisturbed buffer. The wetland has been categorized as a Category II wetland. Category II wetlands have 100-foot buffers.

This Wetland Approval contains conditions which have been placed on the site to allow for the construction of a one-family dwelling and septic system, within three years from the date of issuance. At the end of three years, any building which was not completed, and any newly proposed construction must undergo additional wetland review. if none of the approved activities or construction occurs on the site in three years, the wetland approval will expire, but the site is still subject to all existing wetland regulations. Construction of any part of the proposal validates the wetland approval and requires that the conditions be met.

The issuance of this wetland approval does not constitute

approval of this project by other departments or agencies with jurisdiction. The applicant must comply with all other applicable requirements of Pierce County Departments and other state and federal agencies with jurisdiction.

Further development on this site may require additional environmental and wetland review.

Please be advised that Pierce County Planning and Land services may suspend or revoke this approval if the applicant has not complied with any or all of the conditions or limitations set forth in the approval, has exceeded the scope of work set forth in the approval, or has failed to undertake the project in the manner sat forth in the approved application. In addition, the Department is charged with the enforcement of the Wetland Management Regulation, and is authorized to issue violation notices and administrative orders, levy fines, and/or institute legal actions in court.

WETLAND CONDITIONS:

1. The following activities within the wetland and its buffer, unless exempted by Section 17.12.050 of the Pierce County Wetland Management Regulations, shall be regulated;

   a. Removing, excavating, disturbing or dredging soil, sand, gravel, minerals, organic matter or materials of any kind;

   b. Dumping, discharging or filling;

   c. Draining, flooding or disturbing the water level or water table. In addition, an activity which involves intentional draining, flooding or disturbing the water level or water table in a wetland, in which the activity itself occurs outside the wetland and buffer,

shall be considered a regulated activity;

d. Driving piling or placing obstructions, including placement of utility lines;

e. Constructing, reconstructing, demolishing or altering the size of any structure or infrastructure;

f. Altering the character of a wetland by destroying or altering vegetation through clearing, harvesting, cutting, intentional burning, shading or planting;

g. Activities which result in significant changes in water temperature or physical or chemical characteristics of wetland water sources, including changes in quantity of water and pollutant level;

h. Application of pesticides, fertilizers and/or other chemicals, unless demonstrated not to be harmful to wetland habitat or wildlife; and

i. The division or redivision of. land.

2. A building setback line of eight feet shall be established from the edge of the wetland buffer.

3. A silt fence shall be placed along the landward edge of the wetland buffer before any timber harvesting, clear ing, grading or construction begins, and shall be maintained throughout the construction period. The fence shall be removed once the new vegetation has been established.

4. The design and placement of the septic systems and drainfields shall avoid adversely impacting the wetland. All drainfields shall be a minimum of 100 feet from the edge of the wetland.

5. All down and dead woody material, including logs and fallen branches shall be left in the wetland and its buffer to provide structure, habitat, and nutrients to the wetland system.

6. All snags (dead trees) and perch trees (trees with broken tops or limbs) shall be left in the wetland and its buffer as they provide an important wildlife habitat component to the buffer and wetland. Danger trees shall only be cut or removed with the permission of Pierce County Planning and Land Services.

7. All exotic, invasive or undesirable vegetation and all weeds listed on the State Noxious Weed List may be removed from the wetland and buffer by clipping, hand pulling, hand digging or by an alternative plan upon approval of Pierce County Planning and Land Services.

8. Due to the sensitive nature of the wetland, applications of pesticides, fertilizers and/or other chemicals in the wetland and or buffer is prohibited.

9. Construction materials, land clearing debris, lawn clippings and other garden debris shall not be placed in the wetland or its buffer.

10. Burning of land clearing slash and other materials in the wetland or its buffer is prohibited.

11. No livestock or other domestic animals shall be introduced to the wetland or buffer without prior approval by Pierce County Planning and Land Services.

Reviewed and Approved by: _____

DIANE M. RYBA, Environmental Biologist

Supreme Court, U.S.
FILED
AUG 28 2000
CLERK

(2)

No. 00-163

IN THE

Supreme Court of the United States

CHERI TROY,

Petitioner,

v.

PIERCE COUNTY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE WASHINGTON STATE SUPREME COURT

BRIEF IN OPPOSITION

JOHN W. LADENBURG*
Pierce County Prosecuting Attorney
JILL GUERNSEY
Deputy Prosecuting Attorney
955 Tacoma Avenue South
Suite 301
Tacoma, WA 98402-2160
(253) 798-7742

* *Counsel of Record* *Attorneys for Respondent*

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(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

The question presented for review by the Petition is whether the local government's wetland management regulations which require preservation of wetland areas are an unconstitutional taking in violation of the Fifth and Fourteenth Amendments to the United States Constitution and whether such wetland regulations entitle Petitioner to compensation. Pet. at *i* and 3. Petitioner mistakenly argues that the Pierce County Wetland Management Regulations (WMR) require a property owner to convey or dedicate wetland areas to the county or the public, and that she is entitled to compensation for such conveyance/dedication. Pet. at i, 4, 6, 10, 12, 13, 17, and 19.

Petitioner further argues that these wetland regulations violate the Contracts Clause of Article I § 10 of the U.S. Constitution. Pet. at *i* and 18.

The local regulations at issue do not amount to a "regulatory taking" in violation of the Fifth and Fourteenth Amendments to the United States Constitution, nor are such regulations a state law in violation of Article I § 10 of the U.S. Constitution. The regulations require only that the wetland areas on property proposed to be developed be identified and protected. The Washington State Court of Appeals' decision was proper, and Respondent respectfully urges this Court to deny the Petition for Writ of Certiorari.

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TABLE OF CITED AUTHORITIES

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Cases:

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General Motors Corp. v. Romein, 503 U.S. 181, 112 S. Ct. 1105, 117 L. Ed. 2d 328 (1992) 6

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992) 3, 4, 5

MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 106 S. Ct. 2561, 91 L. Ed. 2d 285 (1986) 4

Ogden v. Saunders, 12 Wheat. 213, 6 L. Ed. 606 (1827) 6

Saxe v. Breier, 396 F. Supp. 407 (E.D. Wis. 1975) 7

Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985) 4

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Statutes:

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CASE HISTORY

In 1991, Petitioner Cheri Troy purchased a five-acre parcel of undeveloped property in unincorporated Pierce County, intending to construct a single-family dwelling.[1] The following year Pierce County enacted Wetland Management Regulations (WMR)[2] for the protection of environmentally critical wetland areas.

Because of the presence of wetlands on her property Petitioner was required to categorize and delineate the location of the wetlands before she could obtain a building permit. During the wetland process Petitioner was informed that the location of her single-family dwelling encroached upon the wetland buffer. Accordingly, Petitioner was directed to either relocate the structure or propose mitigation to compensate for the encroachment into the wetland buffer.[3]

Petitioner revised her site plan so that her proposed dwelling was located outside the wetland buffer, and the County agreed to issue wetland approval. In accordance with the WMR,

---

1. The facts in this case history are as reported in the Washington State Court of Appeals October 1, 1999, decision, Appendix A1 to Petition for Writ of Certiorari.

2. The WMR in their current form are codified at 18E of the Pierce County Code.

3. If Petitioner's property had been significantly covered by wetlands, Petitioner could have applied for a "reasonable use exception," which is similar to a variance. See App. A, section 17.12.120(E) of the Pierce County Code, now codified as amended PCC 18E.30.100.

Petitioner had to mark the edge of the wetland buffer with permanent markers placed every 30 feet and record a Wetland and/or Buffer Notice[4] on the title to the land.

At this point Petitioner asserted that the County was "taking" her property without compensation. Petitioner seemed particularly concerned about a provision in the WMR that appeared to her to transfer property rights from her to the County:

> Prior to final approval of any wetland application, the part of the wetland and/or buffer which is on the site shall be placed in a separate wetland tract or tracts, protective easement, public or private land trust dedication, or similarly preserved through an appropriate protective mechanism as determined by Pierce County. All wetland tracts, protective easements, land trust dedications and other similarly preserved areas shall remain undeveloped in perpetuity, except as they many be allowed to be altered pursuant to this Chapter.[5]

Ultimately, Petitioner applied for a wetland variance as a way to challenge the WMR. The variance was denied by

---

4. The substance of the Notice states:

> This property contains wetlands or wetland buffers as defined by Pierce County Code 17.12. Restrictions on use or alteration of the wetlands or wetland buffers may exist due to natural conditions of the property and resulting regulations.

5. *See* Pierce County Code 17.12.140(E), Appendix A, now codified as amended PCC 18E.30.080.

the County hearing examiner and Petitioner appealed the denial to Superior Court. In addition to the appeal of the denial of the variance, Petitioner alleged that the County had inversely condemned her property, that the County's actions constituted arbitrary and capricious conduct entitling her to damages under state law and federal law, and the County violated the Contracts Clause of the Washington and U.S. Constitutions.

The Superior Court dismissed her case and Petitioner appealed to the Washington State Court of Appeals. In an unpublished decision issued October 1, 1999, the Court of Appeals affirmed the dismissal of Petitioner's case. After the Washington State Supreme Court denied her petition for review, Petitioner sought review by the United States Supreme Court.

The gravamen of Petitioner's case seems to be her mistaken belief that the County WMR require her to dedicate, deed, transfer or convey property rights to the County. A review of the WMR establishes that once the presence of wetlands have been located on a property proposed to be developed, the WMR require that such wetlands be preserved and protected. Title to the wetlands remains in the ownership of the property owner. No dedication to the public occurs.

REASONS FOR DENYING THE WRIT

A. THIS CASE IS NOT RIPE FOR REVIEW.

The Supreme Court has frequently held that a matter is not ripe for review when a petitioner "has not yet obtained a final decision regarding how [he/she] will be allowed to develop [his/her] property. *Lucas v. South Carolina Coastal*

Council, 505 U.S. 1003, 1011, 112 S. Ct. 2886, 2891, 120 L. Ed. 2d 798 (1992); quoting *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 190, 105 S. Ct. 3108, 3118, 87 L. Ed. 2d 126 (1985). "Our cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351, 106 S. Ct. 2561, 2567, 91 L. Ed. 2d 285 (1986).

The final site plan submitted by Petitioner on July 21, 1994, was approved on August 22, 1994. App. A3 to Petition for Writ of Certiorari. Such site plan showed that Petitioner's single-family dwelling would not be located within the wetland or wetland buffers. *Id.* All that remained was for Petitioner to record the notice regarding the presence of wetlands and identify the wetland areas with markers. *Id.* Petitioner failed to do both, but instead wrote letters to and ultimately brought suit against the County. The variance sought by Petitioner was in actuality an attempt to get the County hearing examiner to rule that the County WMR were unconstitutional because she incorrectly believes that the WMR required her to deed property to the County. *Id.* at A6-7.

Petitioner nevertheless argues, as she has done previously, that she wanted to conduct farming activities on her property and that she is concerned regarding the impact the WMR would have on the "farm-ability" of her property. See Pet. at 6. Respondent is unaware of any applications Petitioner filed with the County with respect to farming activities on the property; therefore, if Petitioner is challenging the WMR as they pertain to farming activities,

she has failed to request approval from the County for any such activities. In the absence of such request, this case is not yet ripe for review.

B. THE COURT OF APPEALS' DECISION COMPORTS WITH ESTABLISHED "TAKINGS" JURISPRUDENCE.

Petitioner mistakenly begins by arguing that because the WMR require that wetlands be staked and protected, a "taking of title" or "physical invasion" has somehow occurred . Pet. at 15. While Petitioner appears to concede that the Supreme Court has recognized that in order to prevail on a takings claim, a landowner must prove that (1) the challenged regulations compel the landowner to suffer a physical "invasion" of his/her property, or (2) that the landowner has been denied all economically viable use of the property as a result of the challenged ordinance,[6] Petitioner fails to explain how the identification and preservation requirements of the WMR amount to either a physical invasion of the property or deprivation of all economically viable use of the property.

The Court of Appeals decision properly recognized that to succeed in a takings challenge, Petitioner must show a total taking of the property's value or a physical invasion of the landowner's property. See App. A12 to Petition for Writ of Certiorari, fn. 11. The Court of Appeals concluded, however, that because Petitioner had never placed identification markers on the wetlands there was no physical invasion of her property. *Id.* Similarly, the Court of Appeals

6. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1015, 112 S. Ct. 2886, 2893, 120 L. Ed. 2d 798 (1992); Pet. at 15-16.

correctly concluded that because Petitioner had conceded that her property retains some economic value there was no regulatory taking of her property. *Id.*

In the absence of either a physical invasion of the property or a regulation which denies a property owner all economically viable use of his/her property, there is no violation of the Takings Clause of the Fifth and Fourteenth Amendments of the U.S. Constitution.

Similarly, Petitioner's reliance on the "rough proportionality" test of *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994) is misplaced in that the Supreme Court has not extended *Dolan's* rough proportionality test beyond the context of "exactions" or land use decisions conditioning approval of development proposals on the dedication of property to public use. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 703, 119 S. Ct. 1624, 1635, 143 L. Ed. 2d 882 (1999). Because there has been no dedication or exaction, the rough proportionality test is not relevant.

C. THE WETLAND MANAGEMENT REGULATIONS DO NOT VIOLATE THE CONTRACTS CLAUSE OF U.S. CONSTITUTION, ARTICLE I § 10.

Petitioner argues that the County WMR are a violation of U.S. Constitution, Art. 1 § 10, which provides that "[n]o State shall . . . pass any . . Law impairing the Obligation of Contracts." Pet. at *i* and 18.

A contract is an agreement in which a party undertakes to do, or not to do, a particular thing. *Ogden v. Saunders*, 12 Wheat. 213, 316, 317, 6 L. Ed. 606 (1827). Changes in

the laws that make a contract legally enforceable may trigger Contracts Clause scrutiny if they impair the obligation of pre-existing contracts, even if they do not alter the contracts' bargained-for terms. *See General Motors Corp. v. Romein*, 503 U.S. 181, 182, 112 S. Ct. 1105, 1107, 117 L. Ed. 2d 328 (1992).

In the present case the only contract mentioned is a real estate purchase and sale agreement wherein Petitioner claims to have purchased the property in 1991. Pet. at 4. The County is not a party to Petitioner's real estate contract, nor was any evidence presented to suggest that the WMR prevent or prohibit the Petitioner's ability to comply with the terms and conditions of the contract. The parties to such real estate contract still have the same ability to enforce the bargained-for terms that they did before the WMR were enacted in 1992.

An argument similar to the one made by Petitioner in this case was summarily dismissed in *Saxe v. Breier*, 396 F. Supp. 407 (E.D. Wis. 1975), wherein the plaintiff argued that a local ordinance which regulated massage parlors violates the constitutional proscription against state law impairment of contracts contained in Article I § 10 of the U.S. Constitution. Plaintiff claimed that the ordinance impaired her contract embodied in her leasing agreement and the "contract" arising from the plaintiff's compliance with the local building code. The Court found plaintiff's claim "to be clearly without merit." So too Petitioner's claims in this regard are without merit.

CONCLUSION

This is not a case where the government has required that a landowner dedicate all or a portion of his/her land to the government in exchange for approval of a development proposal. Nor is it a situation where the government regulations prevent or prohibit all development on a parcel of property.

This is simply a case where the local government has imposed wetland regulations designed to preserve and protect environmentally critical wetlands. Under the regulations at issue, a land owner has the ability to develop the property outside the wetlands and associated wetland buffers, or develop within the wetland areas and provide mitigation for the destruction of such wetlands.

In this case Petitioner submitted a revised site plan wherein she elected to develop outside the boundary of the wetlands and wetland buffers on her property. Her site plan was then approved. All that remained to be done was for Petitioner to permanently flag the wetlands and to record a notice indicating that wetlands are present on the property.

Contrary to Petitioner's understanding and belief, the County's actions do not amount to a dedication of her property. Nor do the County's actions amount to a "physical invasion" of her property. Her property remains valuable and she could have constructed her house on it, had she not elected to sell the property.

While her decisions on how to proceed may have been imprudent and may have reflected her misunderstanding of the regulations and the law, no constitutional violation has occurred.

For the reasons set forth above, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

APPENDIX — EXCERPTS FROM THE WETLAND MANAGEMENT REGULATIONS, PIERCE COUNTY CODE

17.12.120 One-family Dwellings Procedures and Reasonable Use Exception.

An applicant may use the following procedure for construction of a one-family dwelling and regulated activities accessory to a one-family dwelling:

A. Where the Department determines that a regulated wetland may be present within 150 feet of the proposed activity, the applicant shall select one of the following options:

1. The applicant shall provide the Department with a report prepared by a wetland specialist which recommends the appropriate wetland category and includes rationale for the recommendation. The Department will review and approve the wetland category and buffer as follow:

Wetland Category	Buffer
I	150 feet
II	100 feet
III	50 feet
IV	25 feet

2. Alternatively, the Department, upon request, shall determine the appropriate wetland category. The buffer width shall be according to the table in 17.12.120.

Appendix

B. The Department will determine whether the activity would intrude into the buffer, the wetland, or both.

   1. If the Department determines that the proposed activity may intrude into the wetland and/or buffer, the applicant shall prepare a delineation report subject to approval by the Department; or

   2. If the Department determines that the proposed activity may intrude only into the buffer, the Department, upon request, shall delineate the wetland.

C. Following approval of the delineation report or the Department's completion of the delineation, the applicant shall place permanent clearly visible markers on-site at the edge of the buffer. Placement of markers by a licensed surveyor is not required. No regulated activities shall occur within the wetland and/or buffer except as allowed in 17.12.120 Subsection D. Temporary intrusion into the buffer necessary for construction activities may be allowed if the buffer can be adequately restored.

D. Construction of a one-family dwelling and regulated activities accessory to a one-family dwelling shall be allowed:

   1. In the buffer if the applicant demonstrates to the Department that all adverse impacts to wetlands will be mitigated.

   2. In the wetland, after Department approval of the following reports. The reports shall be prepared by a wetland specialist obtained by the applicant.

a. A report which recommends the appropriate wetland category and includes rationale for the recommendation, unless the category has already been determined by the Department; and

b. A wetland delineation report, unless a delineation has already been approved by the Department; and

c. A mitigation plan. The mitigation plan shall provide that all adverse impacts to the wetland will be mitigated.

E. Reasonable Use Exception: If strict application of this Section would not allow use of the property for a one-family dwelling, the Hearing Examiner may approve use of the property for a one-family dwelling. Following a public hearing, approval shall be granted if the following conditions are met:

1. The proposed activity will have only minor impacts to the wetland; and

2. The proposed activity will not jeopardize the continued existence of species listed by the federal government or the state as endangered, threatened, sensitive, or documented priority species or priority habitats; and

3. The proposed activity will not cause significant degradation of groundwater or surface water quality; and

4. All adverse impacts to the wetland will be mitigated to the greatest extent possible; and

5. There will be no damage to public or private property and no threat to the health or safety of people caused by the proposed activity; and

6. The inability to use the property for a one-family dwelling is not the result of segregating or dividing the property after the effective date of this Chapter.

* * *

17.12.140 Wetland Application Procedure and Fees.

A. The Department shall, to the extent reasonable, consolidate the processing of related aspects of other Pierce County regulatory programs which affect activities in wetlands, such as subdivision, site development, floodplain and environmentally sensitive areas, with the wetland approval process established herein so as to provide a timely and coordinated review process.

* * *

D. Notice on Title: When Pierce County determines that activities not exempt from this Chapter are proposed, the property owner shall file for record with the Pierce County Auditor a notice approved by the Department in a form substantially as set forth below. The notice shall provide notice in the public record of the presence of a wetland or buffer, the application of this Chapter to the

property, and that limitations on actions in or affecting such wetlands and buffers may exist. The notice shall be notarized and shall be recorded prior to approval of any land use proposal for the site.

Notice on title is not required for utility line easements on lands not owned by the jurisdiction conducting the regulated activity.

Form of notice:

WETLAND AND/OR WETLAND BUFFER NOTICE

Tax Parcel Number:

Address:

Legal Description:

_____

_____

_____

_____

Present Owner:

_____

NOTICE: This property contains wetlands or wetland buffers as defined by Pierce County Code 17.12. Restrictions on use or alteration of the wetlands or wetland buffers may exist due to natural conditions of the property and resulting regulations.

Date _____ Signature of owner _____

Notary acknowledgment and notary seal _____

E. Wetland Tract

1. Prior to final approval of any wetland application, the part of the wetland and/or buffer which is on the site shall be placed in a separate wetland tract or tracts, protective easement, public or private land trust dedication, or similarly preserved through an appropriate permanent protective mechanism as determined by Pierce County. All wetland tracts, protective easements, land trust dedications and other similarly preserved areas shall remain undeveloped in perpetuity, except as they may be allowed to be altered pursuant to this Chapter.

2. Prior to final approval of any wetland application, the common boundary between a wetland tract, protective easement, land trust dedication, or other similarly preserved area and the adjacent land shall be permanently identified with permanent signs. Sign locations, wording, and size and design specifications shall be as required by the Department.

3. At any time after a wetland tract, protective easement, land trust dedication, or other similarly preserved area has been established, the owner may submit a

delineation report to the Department. If the Department determines that a boundary change has occurred, or that a wetland no longer exits, the wetland tract, protective easement, land trust dedication, or other similarly preserved area may be altered or eliminated, as appropriate. If the Department determines that wetland boundaries have changed or that a wetland has been eliminated due wholly or in part to illegal activity, a change or elimination of wetland tract, protective easement, land trust dedication, or other similarly preserved area shall not be permitted.

4. A wetland tract, protective easement, land trust dedication, or other similarly preserved area is not required for utility lines in easement on lands not owned by the jurisdiction conducting the regulated activity.

F. Review and Approval: A Wetland Application shall be reviewed by the Department. Approval shall be granted upon a determination that the wetland analysis report and mitigation plan meet all applicable requirements of this Chapter, and that the monitoring program and contingency plan are tied to an acceptable financial guarantee to assure that the requirements will be complied with.

G. Expiration: Approvals shall be valid for a period of three years from the date of issue unless a longer or shorter period is specified by the Department. An extension of an original approval may be granted upon submittal of a written request to the Department prior to expiration.

Appendix

Prior to the granting of an extension, the Department may require updated studies if, in its judgment, the original intent of the approval is altered or enlarged by the renewal, if the circumstances relevant to the review and issuance of the original permit have changed substantially, or if the applicant failed to abide by the terms of the original approval.

* * * *

(3)

No. 00-163

Supreme Court, U.S.
FILED
SEP - 7 2000
CLERK

In The

Supreme Court of the United States

October Term, 1999

CHERI TROY,
Petitioner,

v.

PIERCE COUNTY,
Respondent

On Petition For Writ of Certiorari to the
Court of Appeals, Division II, of the State of Washington

REPLY TO BRIEF IN OPPOSITION

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12 pp

QUESTIONS PRESENTED

In this case the government desires to permanently preserve areas of land in a natural, undisturbed state, and a County ordinance accomplishes this by requiring owners of the selected land, as a building permit condition, to "protect" the selected area by deeding a tract, easement, or land dedication to "the County" or "the public", and, by having county signs installed every 30 feet to mark the boundaries of the preserved tract.

1) Where the owner's proposed construction does not create the need for a land preserve, is just compensation required under the U.S. Constitution's Fifth Amendment (applied to the States through the Fourteenth Amendement) for the property conveyance and/or for the physical occupation of the signs?

2) In acquiring the above tract, where the County provides no hearing, nor any process for getting compensation, and requires the conveyance to be made by recording a plat of subdivision that violates plat statutes (a gross misdemeanor), is there just cause for damages for denial of due process under the U.S. Constitution's Fifth Amendment and/or for deprivation of civil rights under 42 U.S.C. § 1983?

3) Since the above ordinance is applied at development time, when it is common to have the land as subject or collateral in financing contracts, is the County's appropriation of a property interest without any consideration of existing contract interests or obligations, in violation of Article 1 § 10 [1] of the U.S. Constitution: "No State shall * * * pass any * * * Law impairing the Obligations of Contracts * * *" ?

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REPLY

In its brief, the County quotes the wetland regulations which require both the installation of permanent markers and the creation of an easement, dedication, or similar mechanism, (Response, p. 2, 6a). And, the County admits that it required Troy to have the markers installed, and to record a document on title. The response brief, page 2, also mentions that variance from those requirements was denied.

Yet Pierce County's opposition is based on the contention that the County's requirements did not require any physical occupation of Troy's property, nor the conveyance of a property interest. That basic assumption is repeatedly asserted without one shred of support.

I. INSTALLATION OF PHYSICAL SIGNPOSTS DOES CONSTITUTE A PHYSICAL OCCUPATION OF LAND

The County concedes that the regulation requires permanent "markers" to be placed on the land (Response p. 2, 4). (On Troy's land, to be "clearly visible" over the five-foot weed growth, these "markers" would be signs, six feet high.) However, the County raised the argument (p. 5, 6, 8) that the requirement does not constitute a physical invasion of property. This is a misstatement of law and fact.

The precedent of *St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92 (1892), *rehearing denied*, 149 U.S. 465 (1893), specifically established that the physical presence of poles is a compensible taking. The County presents no fact, no law, case law, nor law of physics to support the theory that the physical presence of the signposts is anything other than a physical occupation of the land.

II. IT IS TROY'S REFUSAL TO INSTALL THE SIGNS THAT ENABLES HER TO CONTEST THE REQUIREMENT THAT THE SIGNS BE INSTALLED.

The County raised the argument that the Court should not address the constitutionality of the sign requirement because Troy didn't install any of the signs. (Response, p. 5) This is a misstatement of law.

The County should be estopped from arguing that any construction is required, since the County's "conditions" include the provision that, "Construction of any part of the proposal validates the wetland approval and requires that the conditions be met." (Petition for Writ of Certiorari, p. G 4)

Moreover, in Washington State, the courts consider compliance with a permit requirement to be a waiver of the right to challenge it. This is readily apparent in the case of *Northwest Land & Inv. v. City of Bellingham*, 31 Wash.App. 742, 644 P.2d 740, 741, (1982). The court refused to reach the question of the lawfulness of development conditions, with the finding that, "The proximate cause of the plaintiff's loss was its decision to comply with the conditions and not seek review."

The correct interpretation of the law is, that Troy may not assess space rental damages, since the signs were not installed. However, the constitutional challenge is appropriate, is ripe, and it is quite important, as it affects not only Troy, but the 5,551 future wetland applicants. It may also affect some of the 1,029 landowners who have already installed signs. (If one is not aware of the right to compensation, one cannot have waived that right.)

III. THE "NOTICE" DOCUMENT DOES AFFECT THE LANDOWNER'S TITLE, OTHERWISE IT COULD NOT BE RECORDED.

The County raised the argument that recording the "notice" does not affect title (Response p. 4, 8). This premise is a misstatement of Washington State Law.

Title is the means whereby the owner of lands has the just possession of his property. (*Black's Law Dictionary*, 5th Ed., p. 1331, "Title, Real Property Law").

> "Conveyances and encumbrances upon real property in this state may be recorded with a county auditor where the property is located. However, only "real property rights" may be recorded." (Final Legislative Report, 1979, 46th Reg. Session and First Ex. Session, p.. 120-21 (Washington State)).

Only documents which facially purport to affect title may be recorded. (AGO 1996 No. 12 p. 6-7 (Washington State)).

The fact that the auditor not only records wetland "notice" documents, but records them as a grant from the landowner to "Pierce County" or "the public," indicates that title is most definitely affected.

IV. THE DOCUMENTS ARE A CONVEYANCE, A DEED, A DEDICATION TO THE PUBLIC

The County raised the argument that no dedication to the public occurs. If there is no deed, there can only be a taking if the property has no remaining value, and the rough propor-

tionality test of *Dolan v. City of Tigard*, 512 U.S. 374 (1994) does not apply. (Response p. 3, 4, 6, 8).

The assertion that there is no conveyance or dedication is a misstatement of fact and law. As shown in the Petition for Writ of Certiorari, p. 8-9, the County's use of the language "plat map or final binding site plan" serves to create a three acre wetland-and-buffer land preserve dedicated to the public, for the public use. If the County did not intend to create this dedication, the County would be using different words.

Similarly, if the County did not intend to create deed/title restrictions (restrictive covenants), it would not be recording restrictions on title.

If the County did not intend to go on record as the recipient of a property interest, it would not choose to record the wetland documents with "Pierce County" or " the public" named as "grantee".

However, the County deliberately chooses to do all of the above. To date, 1,029 such dedications, covenants, conveyances to the County/the public have been recorded, with the paperwork, supplied by the County, substantially the same as Troy's.

V. THE PARCEL DOES NOT REMAIN SOLELY IN TROY'S OWNERSHIP

The County raised the argument that title to the wetlands remains in the ownership of the property owner. (Response p. 3) This is a misstatement of fact and law.

Since the dedication is as a quit claim deed, giving the public an estate in the land, Troy would become, at best, a co-owner of the original parcel. Unfortunately, she would remain the owner responsible for land payments and taxes;

the public takes a free ride.

This would become readily apparent if, arguendo, Troy defaulted on the land taxes. The dedication and restrictive covenants would survive the tax sale to remain on the purchaser's tax title. Thus, the public's ownership interest in the parcel is actually a more secure interest than Troy's.

An example is the case of *City of Olympia v. Palzer*, 107 Wash.2d 225, 728 P.2d 135 (1986) in which preservation covenants survived a tax sale.

VI. PURCHASE CONTRACTS ARE IMPAIRED BY THE COUNTY'S UNCOMPENSATED ACQUISITION OF SOME OF THE PROPERTY INTERESTS THAT ARE BEING PURCHASED

The County recognizes that there is a land purchase contract, but raised the argument that there is no interference with the bargained-for terms of the contracts. (Response, p. 7) This is a misstatement of fact and/or law.

Troy has a standard real estate purchase contract. The owner/seller, Mr. Rheault, is obligated to deliver five acres of land, as a fee simple estate (subject only to the existing road easement). If he records the County's papers, the fee simple estate would be destroyed, and he could no longer satisfy his contract obligation.

Troy is allowed to use the land before payment is complete, subject to covenants not to waste, damage, or destroy the land or its timber, and to conduct farm operations in accordance with good farm practices. Deeding away the rights to use, farm, and log the land is not good farming practice, and is wasteful and damaging to both the property

and its value. Under the contract, had Troy recorded the documents, she would be in violation of the covenants, in default of contract, could be liable for damages, and subject to forfeiture of her buyer's interest.

The situation could be avoided if the County condemned or purchased the property interest they desire.

The County's case cite of *Saxe v. Breier*, 396 F. Supp. 407 (E.D. Wis. 1975), is not similar to Troy's case, but provides an interesting contrast. Saxe complained that the passage of an ordinance on the books, which changed the code requirements for massage rooms, impaired his existing contract for the lease of space for a massage parlor.

Troy does not complain that the presence of the ordinance on the books impairs her contract. Rather it is the contract of conveyance to the County that the County wishes to record on her landowners title, that directly impairs her existing land contract for title.

The *Saxe* court said that Saxe had not overcome the presumption that legislative enactments are not contractual terms. In Troy's case, the County is trying to make the contractual terms to be recorded on Troy's private land title, appear to be a legislative enactment, and thus avoid the requirement of just compensation.

CONCLUSION

The County's Brief in Opposition presents a perfect example of the tenets of takings jurisprudence at all levels throughout the State of Washington:

Tenet 1: Taking by Permanent Physical Occupation.

The requirement that physical "markers" be permanently erected on the land is NOT to be considered a physical occu-

pation, as long as the land retains some value and the owner can construct a house.

Tenet 2: Taking of Title

The requirement that an owner's title be breached by the addition of documents that are recorded as a grant from landowner to "the public" or "the County"
does NOT constitute a dedication, conveyance to the government, or taking of title. It is not a taking as long as some area of the parcel remains that may be developed.

Tenet 3: Regulatory Takings

As long as the owner's name is not completely erased from title, no "taking of title" occurs. The County's actions are therefore "regulatory", and no "taking" can occur as long as the land retains some remnant of value.

Tenet 4: Impairment of Contract

Contract is not impaired if the parties still have the ability to "enforce" bargained-for terms.

The destruction of the ability to "perform" bargained-for terms (and damages from the ensuing lawsuits for default of contract) are not to be considered.

If the above tenets do not fully comport with the Takings policies of this Court, Petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

You may also wish to consider summary reversal pursuant to 28 U.S.C. § 2106, to clarify the proper policies.

Dated: Sept. 5, 2000

Respectfully submitted,

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